(10)

No. 87-981-CFX
Status: GRANTED

Title: Beech Aircraft Corporation, Petitioner
v.
John C. Rainey, etc., et al.

Docketed:
December 15, 1987

Court: United States Court of Appeals
for the Eleventh Circuit

Vide:
87-1028

Counsel for petitioner: Womack,Joseph W.

Counsel for respondent: Curtis,Edward R., Larry,Dennis K.

Entry	Date	Note	Proceedings and Orders
1	Dec 15 1987	G	Petition for writ of certiorari filed.
2	Jan 15 1988		Brief of respondents John L Rainey and Rondi M. Knowlton in opposition filed.
3	Feb 10 1988		DISTRIBUTED. February 26, 1988
4	Feb 19 1988	X	Reply brief of petitioner Beech Aircraft Corp. filed.
5	Feb 29 1988		Petition GRANTED. The case is consolidated with 87-1028 and 87-1146, and a total of one hour is allotted for oral argument.
			**********
6	Mar 31 1988		Joint appendix filed. VIDED.
8	Apr 12 1988		Brief of petitioner Beech Aerospace Services, Inc. filed. VIDED.
7	Apr 13 1988		Brief of petitioner Beech Aircraft Corp. filed. VIDED.
10	May 13 1988		Brief of respondents John L Rainey and Rondi M. Knowlton filed.
9	May 24 1988		Record filed.
		*	Certified original record and proceedings, 5 boxes, received.
11	Jun 13 1988		Reply brief of petitioner Beech Aircraft Corp. filed. VIDED.
12	Jun 23 1988		CIRCULATED.
14	Jun 25 1988		Application (A-994) of Beech Aerospace Services, Inc. for leave to file reply brief out-of-time, and order extending time to and including July 6, 1988, by Kennedy, J., on June 30, 1988.
13	Jul 2 1988	X	Reply brief of petitioner Beech Aerospace Services, Inc. filed. VIDED.
15	Jul 15 1988		Set for argument. Tuesday, October 4, 1988. This case is consolidated with 87-1028. (3rd case) (1 hr.)
16	Oct 4 1988		ARGUED.

EDITOR'S NOTE

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87-981

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO.

in the

Supreme Court
of the
United States

October Term, 1987

BEECH AIRCRAFT CORPORATION,

Petitioner,

vs.

JOHN C. RAINEY,

Respondent,

BEECH AIRCRAFT CORPORATION,

Petitioner,

vs.

RONDI M. KNOWLTON,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether evaluative conclusions contained in a trustworthy investigative report, prepared pursuant to law are admissible pursuant to Federal Rule of Evidence 803(8)(c)?

II.

Whether the Eleventh Circuit Court of Appeals misconstrued Fed. R. Evid. 106 and 801 (d)(1)(b) in holding that the Trial Court abused its discretion by refusing to admit an unqualified hearsay opinion?

ALL PARTIES TO THE PROCEEDING IN THE LOWER COURT

1. Lieutenant Commander John C. Rainey

2. Mrs. Rondi M. Knowlton

3. Beech Aircraft Corporation

4. Beech Aerospace Services, Inc.

5. Pratt & Whitney Canada, Inc.

6. United Technologies Corporation is the parent corporation of Pratt & Whitney Canada, Inc.

7. Raytheon Corporation is the parent corporation of Beech Aircraft Corporation.

8. There are no subsidiaries or affiliates of Beech Aircraft Corporation except Beech Aerospace Services, Inc.

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1. Original Panel Opinion of the United States Court of Appeals for the Eleventh Circuit, 784 F.2d 1523 (11th Cir. 1986) (Johnson, J. concurring specially). (Appendix App. 1-15)

2. Eleventh Circuit Opinion granting a rehearing en banc, and vacating prior panel opinion. 791 F.2d 833 (11th Cir. 1986). (Appendix App. 16-17)

3. En Banc Opinion of the United States Court of Appeals for the Eleventh Circuit, 827 F.2d 1498 (11th Cir. 1987) (Tjoflat, J., concurring specially). (Appendix App. 18-63)

STATEMENT OF JURISDICTION

This Court has Certiorari jurisdiction pursuant to 28 U.S.C. 1254 (1). The en banc judgment of the Eleventh Circuit Court of Appeals was entered on September 22, 1987. No Petition for Rehearing was filed.

STATUTORY PROVISIONS AT ISSUE

1.) **Federal Rule of Evidence 803. Hearsay Exceptions; Availability of Declarant Immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) **Public Records and Reports.** Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth . . . (c) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

2.) **Federal Rule of Evidence 106. Remainder of or Related Writings or Recorded Statements.**

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

3.) **Federal Rule of Evidence 801(d)(1)(B). Statements which are not Hearsay: Prior Statement by Witness.**

(d) **Statements Which Are Not Hearsay.** A statement is not hearsay if—

(1) **Prior Statement by Witness.** The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is. . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

STATEMENT OF THE CASE

On July 13, 1982, Lieutenant Commander Barbara Ann Rainey, a Navy flight instructor and her student, Ensign Donald Bruce Knowlton, were killed in an aircraft crash near Middleton Field, Alabama. Their respective spouses instituted wrongful death actions in the United States District Court for the Northern District of Florida. These actions sought money damages pursuant to the Florida Wrongful Death Act from Beech Aircraft Corporation, ("Beech") Pratt & Whitney Canada, Inc. ("Pratt & Whitney") and Beech Aerospace Services, Inc. ("BASI"), see, Fla. Stat. §768.16 et seq. (1985). The Plaintiffs alleged that the pneumatic fuel control system in the T-34C trainer aircraft was defective in its design and/or manufacture, causing the engine to suffer a loss of power.

Following a two-week jury trial, a verdict was returned in favor of the Defendants. Plaintiffs appealed challenging two evidentiary rulings by the District Court. They claimed that the trial judge improperly applied Fed. R. Evid. 803(8)(C) by admitting certain evaluative conclusions contained in a trustworthy Judge Advocate General (JAG) report. The disputed evaluative conclusions were contained in an investigative report of the air crash prepared by Lieutenant Commander William C. Morgan. This JAG report was prepared at the direction of Lieutenant Colonel Habermacher, the commanding officer of Rainey's Training Squadron, pursuant to the Manual of the Judge Advocate General (JAG) §0902, at 9-3 to 9-5.

After investigating the matter over a period of six (6) weeks, Morgan prepared a written report. The report contained a six page summary of the accident and sixty attachments consisting of One Hundred Fifty Nine (159) pages. Morgan's conclusions, as contained in the summary, were later endorsed by six Naval officers. One of the conclusions reached by Lieutenant Commander Morgan was that "The most probable cause of the accident was the pilots [sic] failure to maintain proper interval". Morgan also found that no mechanical irregularities could be specified as a contributing cause of the accident. After consideration and editing by the Trial Judge, specific portions of Morgan's findings were admitted as evidence pursuant to Fed. R. Evid. 803(8)(C).

Plaintiffs also asserted on appeal that the Trial Court improperly limited the cross-examination of Plaintiff, Lieutenant Commander John Charles Rainey.[1] At trial, Rainey was called by the defense as an adverse witness. On direct he was questioned concerning factual admissions contained in a letter which he had written to the investigating JAG officer after the accident.[2] These questions were limited to facts in the letter regarding unnecessary pressure on the pilots, and the final flight maneuvers of the aircraft. During direct examination, Rainey, as an adverse party, was never

[1]Barbara Ann Rainey's surviving spouse, John Charles Rainey, was also a Lieutenant Commander in the United States Navy.

[2]Plaintiff, Mrs. Rondi M. Knowlton also signed the letter which Mr. Rainey prepared following his unofficial inquiries and investigation.

asked whether his letter contained his opinion as to the cause of the crash.

On cross-examination by his counsel, Rainey was permitted to testify that he had not attempted to influence the testimony of the JAG officer nor any witness. The Trial Court, however, refused to allow Rainey to testify that his letter also contained his opinion that the "most probable primary cause of this mishap was rollback". The Plaintiffs alleged that this limitation on Rainey's testimony was error.

On appeal, the Eleventh Circuit Court of Appeals reversed as to each of the evidentiary rulings. The panel concluded that it was bound by prior Fifth Circuit precedent, construing Fed. R. Evid. 803(8)(C), to exclude evaluative conclusions contained in public investigative reports made pursuant to law. See *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980).[3] On this authority the Court held that it was error to admit the selective evaluative conclusions contained in Lieutenant Commander Morgan's investigative report of the subject accident. See *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523 (11th Cir. 1986). Circuit Judge Johnson specially concurred in the panel opinion urging the Court to accept jurisdiction, en banc, to reconsider this interpretation of Rule 803(8)(C). In his concurrence, he characterized *Smith v. Ithaca* as "an anomaly among the circuits", and urged the entire court to adopt the

[3]In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions issued prior to September 30, 1981. Such precedent can only be overruled en banc by a majority of the Eleventh Circuit Judges. *Id.* at 1212.

majority rule favoring admissibility of evaluative conclusions contained in trustworthy public reports. *Rainey,* 784 F.2d at 1530.

The Panel also reversed on the second ground because it felt that the Trial Court improperly limited the cross-examination of Commander Rainey. The Panel held that the Rule of Completeness, as embodied in Fed. R. Evid. 106, required that Rainey be afforded an opportunity to testify as to his opinion on causation which was contained in his unsolicited post accident letter to JAG Officer Morgan. The Court also found that Rainey's statements on cross examination by his counsel regarding the contents of his letter should have been admitted as prior consistent statements pursuant to Fed. R. Evid. 801(d)(1)(B).

Each defendant filed a Petition for panel re-hearing and re-hearing en banc. On May 27, 1986, the Eleventh Court of Appeals vacated the panel opinion and ordered briefing and re-hearing en banc. *Rainey v. Beech Aircraft Corp.*, 791 F.2d 833 (11th Cir. 1986) On September 22, 1987, the Court issued its en banc per curiam opinion holding that Commander Morgan's investigative report was a trustworthy public record of an investigation conducted pursuant to law. However, the en banc Court was dead-locked, six-six, on the issue of whether evaluative conclusions contained in such reports are admissible pursuant to Fed. R. Evid. 803(8)(C). See *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498 (11th Cir. 1987). Following the venerable evenly divided rule, the court was constrained to follow the decision articulated in the panel opinion, which excluded the evaluative conclusions of Commander Morgan. On the second point,

the Court was in agreement that the case should be reversed because the Trial Court improperly limited the cross-examination of Commander Rainey.

STATEMENT OF LOWER COURT'S JURISDICTION

The Lower Court had diversity jurisdiction of this matter pursuant to 28 U.S.C. 1332. (1976)

REASONS FOR GRANTING THE WRIT

A. THE ELEVENTH CIRCUIT'S CONSTRUCTION OF FED. R. EVID. 803(8)(C) EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The several Circuits are divided 10 to 2 in their efforts to fashion an appropriate interpretation of Federal Rule of Evidence 803(8)(C). To litigants the rule is a critical and inexpensive evidentiary tool which provides for the admission of public reports resulting from investigations made pursuant to law. The controversy among the Circuits is whether the phrase *"factual findings"* as used in the rule, includes *evaluative conclusions* derived from investigative reports. See *Rainey*, 827 F.2d at 1508. In the case at bar, the en banc Court was evenly divided and was thus unable to provide its own interpretation of Rule 803(8)(C). See *Rainey*, 827 F.2d at 1501. Instead, the Court was forced to adopt existing Fifth Circuit precedent, which holds that evaluative conclusions contained in trustworthy public reports are not

admissible. *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1981).[4] By adopting *Smith's* narrow interpretation of the rule, the Eleventh Circuit joined the Fifth Circuit in direct conflict with every other Circuit which has spoken to the issue. See *United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975); *Robbins v. Whelan*, 653 F.2d 47 (1st Cir. 1981) cert denied 454 U.S. 1123, 102 S.Ct. 972, 71 L.Ed.2d 110 (1981); *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir. 1983), cert denied 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984); *Melville v. American Home Assurance Corp.*, 584 F.2d 1306 (3rd Cir. 1978); *Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984); *Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978); *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986); *Kehm v. Proctor & Gamble Manufacturing Co.*, 724 F.2d 613 (8th Cir 1983); *Plummer v. Western International Hotels Co.*, 656 F.2d 502 (9th Cir. 1981); *Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986). In fact, the interpretation of Rule 803(8)(C) adopted by the Eleventh Circuit is in conflict with a prior decision of this Court. See *Chandler v. Roudebush*, 425 U.S. 840, 48 L.Ed.2d. 416 and 96 S.Ct. 1949 (1976). In *Chandler*, this Court held that prior administrative findings in an employment discrimination case are admissible, pursuant to Rule 803(8)(C), in a subsequent federal trial on the same claim. The reasoning expressed in *Chandler* was

[4]The Court reached this conclusion notwithstanding the fact that two separate Judges specially concurred calling the *Smith* opinion an "anomaly among circuits", and urging the Court to adopt a rule favoring broad admissibility of evaluative conclusions contained in investigative public reports. See *Rainey v. Beech Aircraft*, 784 F.2d 1523 (11th Cir. 1986) (Johnson, J., specially concurring) and *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498 (11th Cir. 1987) (Tjoflat, J., specially concurring).

adopted in *Cohen v. General Motors*, 534 F.Supp. 509 (W.D. Mo. 1982), wherein the Court admitted conclusory findings by the National Highway Traffic Safety Administration (NHTSA). In so doing, the Court expressly rejected the reasoning in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), noting that this Court, in *Chandler*, had "given a broad directive for liberal use of agency findings." *Cohen*, 534 F. Supp. at 512. See also, *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557 (6th Cir. 1978).

In summary the Fifth and Eleventh go one way while the United States Supreme Court and the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and D.C. Circuits go another.[5] This direct conflict has produced

[5]The confusion surrounding the appropriate interpretation of Fed. R. Evid. 803(8)(C) is so great that intra-Circuit conflict exists regarding the admissibility of evaluative conclusions contained in investigative public reports. See, *Lindsay v. Ortho Pharmaceutical Corp.*, 637 F.2d 87 (2nd Cir. 1980) (FDA Medical Opinions not admissible under 803(8)(C)). *Compare Litton Systems, Inc. v. American Telephone & Telegraph*, 700 F.2d 785 (2nd Cir. 1983) (admitting FCC conclusions regarding unreasonable telephone tariffs pursuant to 803(8)(C)). In fact, although the Eleventh Circuit felt compelled to follow Fifth Circuit precedent excluding evaluative conclusions in public reports, the Fifth Circuit itself has admitted such conclusions pursuant to 803(8)(C) on several occasions. See e.g., *Matthews v. Ashland Chemical, Inc.* 770 F.2d 1303 (5th Cir. 1985); *McClure v. Mexia Independent School District*, 750 F.2d 396 (5th Cir. 1985); *Mac Towing, Inc. v. American Commercial Lines*, 670 F.2d 543 (5th Cir. 1982); *Local Union No. 59 v. Namco Electric, Inc.*, 653 F.2d 143 (5th Cir. 1981); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) cert denied 499 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981); *Hodge v. Seiler*, 558 F.2d 284 (5th Cir. 1977) *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975). As these cases illustrate, the pervasive nature of the conflict regarding Rule 803(8)(C) is such that disagreement exists among several Circuits regarding its appropriate interpretation.

confusion and diametrically opposed rulings on a Rule of Evidence which was intended to be uniform. Thus, compare *Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1983):

> Although there has been some disagreement over whether "evaluative" public records or reports were intended by Congress to be considered "factual findings" for the purposes of Fed. R. Evid. 803(8)(C), it is well established that the phrase should be interpreted broadly. Thus, the fact that the CDC [Center for Disease Control] and Tri-State studies contain tentative conclusions as well as statistical findings does not affect the applicability of the rule.

Ellis, 745 F.2d at 301, with the conclusion reached by the Court in *Smith v. Ithaca*, 612 F.2d 215 (5th Cir. 1981):

> . . . we find the Coast Guard report sufficiently trustworthy to justify the district court's admission of the reports findings of fact. There was no reason for the Coast Guard to have been other than objective. Under *Complaint of American Export Lines*, however, evaluative conclusions and opinions of the Coast Guard Marine Board of Investigation contained in the report should not have been admitted into evidence.

Smith, 612 F.2d at 222 (5th Cir. 1980) (Relying on *Complaint of American Export Lines, Inc.*, 73 F.R.D. 454 (S.D. N.Y. 1977) *accord*, *McQuaig v. McCoy*, 806 F.2d 1298 (5th Cir. 1987) (excluding from evidence evaluative conclusions contained in a police internal affairs

investigation).[6] As these cases illustrate, the Circuit Courts of this country are sharply divided on the issue of whether evaluative conclusions contained in trustworthy investigative reports are admissible pursuant to Rule 803 (8)(C). This conflict will continue to persist, and cases will continue to be decided with different results unless this Court resolves the issue.

The existing conflict with Rule 803(8)(C) is creating particularly acute problems in the Eleventh and Fifth Circuits, where jurors are routinely being denied access to opinions contained in trustworthy public reports. In short, the Fifth and Eleventh Circuits are excluding admission of these evaluative conclusions even though both Circuits readily admit that the investigative reports use sound methodology and are trustworthy public records. See *Rainey*. 827 F.2d at 1516, *Smith*, 612 F.2d at 222. As a result, the manner in which many cases are being decided depends in large part on the Circuit in which they are pending. Such divergent outcomes result in fundamental unfairness and serves to encourage forum shopping among litigants. Given the increasing frequency with which public reports of investigatory proceedings appear in litigation, it is a virtual certainty that this problem will re-occur and

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[6] In *McQuaig*, the Court noted that other Circuits had declined to follow the Fifth Circuit's interpretation of Federal Rule of Evidence 803(8)(C). The Court, however, noted that it was compelled to follow *Smith v. Ithaca*, until overruled by the Supreme Court or the Fifth Circuit En Banc. *McQuaig*, 806 F.2d at 1302, Note 4.

continue to escalate until this Court resolves the conflict.[7]

B. THE ELEVENTH CIRCUIT HAS ADOPTED A CONSTRUCTION OF RULE 803(8)(C) WHICH IS INCONSISTENT WITH THE PURPOSE AND INTENT OF THE RULE.

Federal Rule of Evidence 803(8)(C) was designed to admit as weighable evidence, trustworthy public reports of official investigations conducted pursuant to law. *Rainey v. Beech Aircraft Corporation,* 827 F.2d 1498 (11th Cir. 1987) (Tjoflat, J., specially concurring). This is consistent with the Advisory Committee Notes to the rule, which urge that trustworthy public reports of official investigations should be admitted in the first instance. See Rule 803(8)(C) *advisory committee note,*

[7]Evaluative conclusions in public reports of investigations prepared pursuant to law are appearing in litigation with great frequency and in a variety of contexts. See *Perrin v. Anderson,* 784 F.2d 1040 (10th Cir. 1986) (report of Shooting Review Board); *Ellis v. International Playtex,* 745 F.2d 292 (4th Cir. 1984) (epidemiological studies authored by Federal Center for Disease Control) *Complaint of Paducah Towing Co.,* 692 F.2d 412 (6th Cir. 1982) (Administrative Law Judge's findings regarding reasonableness of captain's action in marine accident); *Baker v. Elcona Homes,* 588 F.2d 551 (6th Cir. 1978) (police report determining that traffic control sign was red); *United States v. School District of Ferndale, Michigan,* 577 F.2d 1339 (6th Cir. 1978) (Findings of HEW examiner regarding segregation of school system); *Chandler v. Roudebush,* 425 U.S. 840, 48 L.Ed.2d 416, 96 S.Ct. 1949 (1976) (prior administrative findings as to employment discrimination claim); *Melville v. American Home Assurance Company,* 584 F.2d 1306 (3rd Cir. 1978) (FAA airworthiness directives).

and *Melville,* 584 F.2d at 1316. The Advisory Committee suggests that such admissibility is warranted because the rule provides "ample provisions for escape if sufficient negative factors are present." Fed. R. Evid. 803 *advisory committees note.* Thus, the focus of the Trial Court's analysis under 803(8)(C) should be on the relative trustworthiness of a report and not on the weight to be given by the fact finder to the evaluative conclusions of the investigative officer. See *Kehm v. Proctor & Gamble Manufacturing Company,* 724 F.2d 613 (8th Cir. 1983) (". . . once a report is conclusively shown to represent findings of a public agency made pursuant to an investigation authorized by law, the central inquiry becomes whether the report is trustworthy") *Id.* at 618. This interpretation of Fed. R. Evid. 803.(8)(C) releases trial judges from drawing "arbitrary lines between fact and opinion, and focuses the Court's inquiry instead on the trustworthiness and relevance of the reports in question." *Rainey v. Beech Aircraft Corporation,* 784 F.2d 1523, 1530 (11th Cir. 1986) (Johnson, J., concurring specially). If the report is found to be a trustworthy public record of an investigation conducted pursuant to law, then it should be received in the same manner as other evidence, for consideration and weighing by the jury.

In the case at bar, the en banc Court held that the disputed Judge Advocate General's Report was trustworthy public record of an investigation made pursuant to law.[8] *Rainey,* 827 F.2d at 1516 ("a majority

[8]This conclusion was entirely appropriate given that Plaintiffs made no attempt to depose Commander Morgan, call him as a witness at trial, discredit his qualifications or attack the methodology employed in his investigation. *Rainey,* 827 F.2d at 1508.

of this court agrees that Lieutenant Commander Morgan's investigative report is a public record and that it is trustworthy for purposes of 803(8)(C)"). *Id.* at 1516. The Court nevertheless concluded that it was error to admit those portions of the report which contained evaluative conclusions. It is respecfully submitted that this restrictive interpretation of Rule 803(8)(c) is incorrect. The history and purpose of this rule, along with the overwhelming weight of authority indicate that public investigative reports should be admitted for factfinder consideration, along with the other evidence, if sufficient indicia of trustworthiness exists.

> There is no reason not to admit the findings simply because they tend towards the conclusory rather than the factual end, unless, as 803(8)(C) further provides, the sources of information or other circumstances indicate lack of trustworthiness.

Kehm v. Proctor & Gamble Manufacturing Company, 724 F.2d 613, 618 (8th Cir. 1983). (quoting in part from *United States v. American Telephone & Telegraph Co.,* 498 F.Supp. 353,360 (D. D.C. 1980). *See also, Litton Systems, Inc. v. American Telephone & Telegraph,* 700 F.2d 785, 818 (2nd Cir. 1983). *Melville v. American Home Assurance Corp.,* 584 F.2d 1306 (3rd Cir. 1978); *Ellis v. International Playtex, Inc.,* 745 F.2d 292 (4th Cir. 1984); *Baker v. Elcona Homes Corp.,* 588 F.2d 551 (6th Cir. 1978); *Baz v. Walters,* 782 F.2d 701 (7th Cir. 1986); *Kehm v. Proctor & Gamble Manufacturing Co.,* 724 F.2d 613 (8th Cir 1983); *Plummer v. Western International Hotels Co.,* 656 F.2d 502 (9th Cir. 1981); *Perrin v. Anderson,* 784 F.2d 1040 (10th Cir. 1986). This rule favoring admissibility is premised on the fact that public

reports of investigations performed pursuant to authority granted by law are presumptively valid. See *Rainey,* 827 F.2d at 1514. *Melville,* 584 F.2d at 1316. Fed. R. Evid. 803 *advisory committee note.* Normally, the investigators employ well accepted methodology and typically, their investigations are performed at or near the time of the incident in question. *Rainey,* 827 F.2d at 1512, 1513 (Tjoflat, J. concurring). *Ellis v. International Playtex,* 745 F.2d at 301. Respectfully, the jury simply should not be denied access to such evidence because the report contains evaluative conclusions. This result is entirely consistent with the overall treatment of opinion evidence under the Federal Rules of Evidence.

> Rule 803(8) should be interpreted in accord with the treatment of opinion evidence. If the report states a conclusion that would be helpful and is reliable, it should be admitted.

Rainey, 827 F.2d at 1515. (Tjoflat, concurring) (quoting from 4. J. Weinstein & M. Berger, *Weinstein's Evidence* ¶803(8) [03] (1985)). See also, Fed. R. Evid. 704 ("[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.")

The Eleventh Circuit's restrictive interpretation of Federal Rule of Evidence 803(8)(C) is not warranted by the language, history or purpose of this Rule. The weight of authority, as well as simple logic, dictates that if an evaluative conclusion in an investigative report is helpful to the trier of fact, it should be admitted as long

as it satisfies the necessary requirements of trustworthiness.

C. FEDERAL RULE OF EVIDENCE 106 IS DESIGNED TO COVER AN ORDER OF PROOF PROBLEM, IT DOES NOT RENDER OTHERWISE INADMISSIBLE EVIDENCE ADMISSIBLE.

After the subject accident, LCDR Rainey wrote to LCDR William C. Morgan, the Judge Advocate General Officer assigned to investigate the air crash. This letter was written after Mr. Rainey had conducted his own informal investigation into the circumstances surrounding the matter. On direct examination, as an adverse party, Mr. Rainey was questioned about factual admissions contained in his letter. (App. 71-78) The examination was limited to questions regarding his written statements about the mental status of the pilots and the final flight path of the aircraft. As one would expect, Mr. Rainey was never asked his opinions as to the cause of the tragic accident. (App. 71-78)

On cross-examination, Rainey was asked by his counsel whether his letter also stated that "the most probable primary cause of this mishap was rollback". The trial court sustained the objections to this question on the ground that Rainey had not been properly qualified to render an expert opinion.[9] (App. 78-81)

[9]It should be noted that the Plaintiffs never attempted, at any point during the trial, to qualify Rainey as an expert in the fuel flow mechanics of the PT-6-A25 engine, nor did they call Rainey in chief or rebuttal.

The Eleventh Circuit Panel reversed this evidentiary ruling concluding that Rainey should have been permitted to testify regarding those portions of his letter dealing with his opinion as to causation. The Panel opined that such testimony was admissible pursuant to the Rule of Completeness as embodied in Federal Rule of Evidence 106. This Rule provides:

> When a writing or recorded statement or part thereof is introduced by a party, and adverse party may require him, at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed. R. Evid. 106. *United States v. Costner,* 684 F.2d 370, 373 (6th Cir. 1982) ("The Rule of Completeness has been codified in Fed. R. Evid. 106") Respectfully, for the reasons which follow, the Eleventh Circuit's construction and application of Federal Rule of Evidence 106 was incorrect and inconsistent with established authority on this issue.

The Rule of Completeness as codified is designed to regulate order of proof and cannot be utilized to admit evidence which is otherwise inadmissible. *United States v. Woolbright,* slip opinion, 86-2414 (8th Cir. 1987); *United States v. Costner,* 684 F.2d 370 (6th Cir. 1980); *United States v. Terry,* 702 F.2d 299 (2nd Cir. 1983); *United States v. Burreson,* 643 F.2d 1344 (9th Cir. 1981); J. Weinstein & M. Berger, *Weinstein's Evidence* ¶803(8)[03](1985). By way of illustration, the Sixth Circuit in *United States v. Costner,* noted:

> The rule covers an order of proof problem, it is not designed to make something admissible which should be excluded (Citations omitted).

684 F.2d at 373. A party simply may not use Fed. R. Evid. 106 as a side door guise for offering otherwise inadmissible testimony. See *United States v. Terry,* 702 F.2d at 314 (". . . in any event, Rule 106 does not render admissible evidence which is otherwise inadmissible.")

In the present case, the Rainey letter was hearsay, and was thus not admissible as evidence. See Fed. R. Evid. 801(c), 802. The Defense utilized Rainey's statements on direct examination as factual admissions against the adverse party-author's interest, pursuant to Fed. R. Evid. 801(d)(2)(A). The Plaintiffs, however, offered no corresponding exception to the hearsay rule to support Rainey's unqualified self-serving opinion as to the probable cause of the accident. As a result, the Eleventh Circuit misapplied Fed. R. Evid. 106 by allowing the Plaintiffs to utilize this Rule to admit otherwise inadmissible hearsay testimony. Compare *Costner,* 684 F.2d at 373 and *Terry,* 702 F.2d at 314.

Federal Rule of Evidence 106 is also inapplicable in the present case because the disputed testimony was not offered to explain or qualify those portions of the letter which were utilized during Rainey's direct examination. *United States v. Crosby,* 713 F.2d 1066 (5th Cir. 1983). See *United States v. Walker,* 652 F.2d 708 (7th Cir. 1981); *United States v. Soures,* 736 F.2d 81 (3rd Cir. 1984). Gainsaid, the direct examination of Rainey was strictly limited to Rainey's own statement of facts concerning

the final flight maneuvers of the aircraft and the pilot's state of mind as contained in his letter. The opinion concerning probable cause, which counsel sought to elicit from Rainey on cross examination was beyond the scope of direct examination, and did not tend to explain or qualify his previous testimony. This question was simply designed to elicit from Rainey an unqualified opinion duplicating his expert's earlier opinions and general theory of the case. Indeed, had his opinion been admitted, it would have been repetitious and redundant. The admissibility of such testimony cannot be supported by Fed. R. Evid. 106. *United States v. Greene,* 497 F.2d 1068, 1082 (7th Cir. 1974); *United States v. Marin,* 669 F.2d 73 (2nd Cir. 1982) ("completeness doctrine does not require introduction of portions of statement that are neither explanatory of nor relevant to the admitted passages"). *Id.* at 84.

Resort to the Rule of Completeness was also unjustified because the Plaintiffs never invoked Fed. R. Evid. 106 to support admission of Rainey's hearsay opinion as to probable cause. In fact, the first mention of this Rule was in the original Eleventh Circuit Panel opinion. However, the plain language of Rule 106, as well as the case law construing it, all indicate that the Rule is not self-executing. *United States v. Larranga,* 787 F.2d 489 (10th Cir. 1986). Therefore, if fairness requires that an entire document be introduced, the time to do so is when the opposition introduces a part thereof. A failure to invoke Rule 106 in a timely fashion results in a waiver of its application. *Hill v. Nelson,* 676 F.2d 1371 (11th Cir. 1982), *United States v. Soulard,* 730 F.2d 1292 (9th Cir. 1984); *21 C. Wright & K. Graham, Federal Practice and Procedure* §5076 (1978) (request to invoke

Fed. R. Evid. 106 should be specific, timely and appear of record.)

In a footnote, the Panel also incorrectly concluded that the defense utilized portions of the Rainey letter as prior inconsistent statements pursuant to Fed. R. Evid. 801 (d)(1)(A). See *Rainey,* 784 F.2d at 1529 (footnote 12). With this false premise as its foundation, the Panel held that Rainey's statement regarding probable cause should have been admitted as a prior consistent statement. See Fed. R. Evid. 801(d)(1)(B). This determination was incorrect as these two rules of evidence have no application in the present case.

The statements contained in Rainey's letter were admitted solely as admissions against a party opponent. See Fed. R. Evid. 801(d)(2)(A). They were neither offered nor admitted as prior inconsistent statements, and the panel's conclusion to the contrary misconstrues Rainey's testimony.

Prior inconsistent statements may only be offered where the declarant has made a statement under oath which is inconsistent with his testimony at trial. See 801(d)(1)(A). In the instant case, the statements in Rainey's letter were not made under oath and his testimony on direct was entirely consistent with his prior statements. See *United States v. Day,* 789 F.2d 1217 (6th Cir. 1986). As a result, the rule of evidence regulating admission of prior inconsistent statements was wholly inapplicable, and, respectfully, the panel's conclusion to the contrary was, erroneous.

Having apparently formed a belief that Rainey was impeached with prior inconsistent statements, the panel concluded that his opinion on probable cause should have been admitted as a prior consistent statement. Fed. R. Evid. 801 (d)(1)(B). However, such statements are only available to rehabilitate an impeached witness who has been charged with a recent fabrication or an improper motive. *United States v. Weil,* 561 F.2d 1109 (4th Cir. 1977); *Hill v. Nelson,* 676 F.2d 1371 (11th Cir. 1982). In the present case, Rainey was neither charged expressly or impliedly, with a recent fabrication or an improper motive. In fact, his testimony on direct was entirely consistent with his previous statements regarding this accident. *4 J. Weinstein and M. Berger, Weinstein's Evidence* §801(D)(1)(B)[01] (1985) ("Rule 801(D)(1)(B) should apply only when there is some suggestion . . . that the witness consciously altered his testimony after making the inconsistent statement by which he has been impeached.") Since Rainey had not been charged with a recent fabrication or change in his story, there was no predicate for the admission of Rainey's opinion on probable cause as a prior consistent statement. The Eleventh Circuit's conclusion to the contrary is in error.

CONCLUSION

The premises and reasons considered, Petitioner, Beech Aircraft Corporation, respectfully prays that the Writ be issued; the en banc opinion of the Court of Appeals be vacated and the Final Judgment of the District Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that three true and correct copies of the foregoing Petition and Appendix have been served this 15th day of December, 1987 on: Mr. Dannis Larry and Mr. Donald Partington, 715 S. Palafox Street, Pensacola, Fla. 32573, Counsel for the Plaintiffs/Respondents, Mr. Robert P. Gaines, P.O. Box 12950, Pensacola, Fla. 32576, Counsel for Pratt & Whitney, and Mr. William H. F. Wiltshire, 201 E. Government Street, Pensacola, Fla. 32598, Counsel for BASI.

KIMBRELL & HAMANN, P.A.

By: Jos. W. Womack
Jos. W. Womack, Esq.

Appendix

[1523]

John C. RAINEY, individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant.

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Canada, Ltd., Defendants-Appellees.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant.

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

* * *

[1525] PER CURIAM:

Barbara Ann Rainey and Donald Bruce Knowlton died on July 13, 1982 in a fiery plane crash at Middleton Field, Alabama. Their spouses, John Charles Rainey ("Rainey") and Rondi M. Knowlton ("Knowlton") sought money damages under the Florida Wrongful Death Act,

Fla.Stat. §§ 768.16-.27 (1985), in district court.[1] The jury returned a verdict against Rainey and Knowlton. We hold that the trial judge committed reversible error in two evidentiary rulings and remand for a new trial.

I.

On July 13, 1982 Lieutenant Commander Barbara Ann Rainey, a flight instructor with the United States Navy, was issued a T-34C Turbo-Mentor aircraft, number 3E955, for a training exercise at Middleton Field, Alabama. Her student was Ensign Donald Bruce Knowlton. Ensign Knowlton was to practice "touch and go" landings and takeoffs.[2] There were five aircraft in the "touch and go" pattern.

Witnesses testified that Ensign Knowlton, after successfully completing four "touch and go" patterns, began "climbing out low; that is, below the standard altitude, and slow, slower than the 100 knots or 90 knots that the aircraft should have been at." Witnesses also

[1]Rainey brought suit individually, as the personal representative of his wife's estate, and on behalf of his minor children, Cynthia Ann Rainey and Katharine Marie Rainey. Knowlton sued individually, as the personal representative of her husband's estate, and on behalf of her minor children, Ramsey Nia Knowlton and Branigan McDermott Knowlton. By order dated March 20, 1984 the two cases were consolidated "for all purposes including consolidation for trial."

[2]A "touch and go" is a training exercise employed to familiarize students with takeoffs and landings. After takeoff, the student circles the airfield in an oval or racetrack pattern and then lands the aircraft. Upon landing, the student does not stop the craft, but accelerates to take off again.

testified that Ensign Knowlton made an early crosswind turn; this early turn prompted two radio transmissions. Captain Charles E. Guthrie, a flight instructor riding in another aircraft in the pattern, cautioned Lieutenant Commander Rainey:[3] "Aircraft turning crosswind, you're cutting somebody out." Similarly, Lieutenant Colonel David I. Habermacher, Jr., a flight instructor in the aircraft forced out of the pattern, transmitted the warning: "Aircraft turning crosswind, you're cutting us out. Heads up."

Lieutenant Commander Rainey did not verbally respond to these radio transmissions. Witnesses testified, however, that following these transmissions Lieutenant Commander Rainey's aircraft banked sharply to the right. While the threatened midair collision with Lieutenant Colonel Habermacher's aircraft was thus avoided, the aircraft piloted by Lieutenant Commander Rainey rapidly lost altitude, crashed in a wooded area two miles southeast of Middleton Field, and burned. Neither Lieutenant Commander Rainey nor Ensign Knowlton survived the crash.

On July 14, 1982 Lieutenant Colonel Habermacher directed Lieutenant Commander William C. Morgan, Jr. to conduct an informal investigation into the circumstances surrounding the crash. On September 1,

[3]It is, of course, impossible to determine whether Lieutenant Commander Rainey or Ensign Knowlton was in control of the aircraft at this time. Witnesses knowledgeable in flight instruction, however, testified that Lieutenant Commander Rainey, a trained pilot and flight instructor, would, under these circumstances, assume control over the aircraft.

1982 Lieutenant Commander Morgan reported, in writing, his findings of fact, opinions and recommendations pursuant to the requirements established by the Judge Advocate General. Lieutenant Commander [1526] Morgan's report lists as an opinion that pilot error was "[t]he most probable cause of the accident."

Rainey and Knowlton disagree with Lieutenant Commander Morgan's opinion. In a letter written to Lieutenant Commander Morgan about the "aircraft mishap," Rainey, also a flight instructor with the United States Navy, concluded that the mishap was not the result of pilot error but more probably "caused by some form of pneumatic sensing/fuel flow malfunction, probably in the fuel control unit." According to Rainey, the malfunction prompted an inflight "power interruption" or "rollback" making it impossible for Lieutenant Commander Rainey to sustain sufficient power to maintain flight. Knowlton agreed with Rainey's conclusion and on April 15, 1983 Rainey and Knowlton filed separate suits in the United States District Court for the Northern District of Florida, alleging negligence and strict product liability causes of action. Beech Aircraft Corporation, the manufacturer of the T-34C Turbo-Mentor aircraft, Pratt and Whitney Canada, Inc., the manufacturer of the engine incorporated into the T-34C aircraft, and Beech Aerospace Services, Inc., the United States Navy's contract maintenance service for the T-34C aircraft, were named as defendants.

At trial, the only disputed issue was the cause of the fatal crash. Because both Lieutenant Commander Rainey and Ensign Knowlton were not available to

testify and because the aircraft was almost totally destroyed by fire, the parties relied heavily on opinions developed by expert witnesses. The defendants also relied on the opinions contained in the investigative report prepared by Lieutenant Commander Morgan. Pointing to Lieutenant Commander Morgan's opinion that pilot error was the most probable cause of the crash, the defendants argued that they should not be held responsible. The jury agreed.

On August 1, 1984 Rainey and Knowlton, complaining about two of the trial judge's evidentiary rulings, filed a motion for a new trial.[4] The judge denied the motion. This appeal promptly followed.

II.

The district court admitted into evidence, over Rainey and Knowlton's objection, excerpts from the investigative report prepared by Lieutenant Commander Morgan.[5] On appeal, Rainey and Knowlton

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[4]Rainey and Knowlton objected to the admissibility of several opinions contained in Lieutenant Commmander Morgan's investigative report. Rainey and Knowlton also objected to the restriction of Rainey's trial testimony. These objections are now raised on appeal.

[5]On March 20, 1984, at the pretrial conference, the district court ruled that Lieutenant Commander Morgan's report was trustworthy and admissible but "only on its factual findings and would not be admissible insofar as any opinions or conclusions are concerned." On July 10, 1984, the day before trial, the district court reversed in part its prior ruling. At that time, the judge decided to admit into evidence the opinions and conclusions contained in the investigative report.

argue that many of the excerpts from the investigative report, specifically Lieutenant Commander Morgan's opinions, should not have been admitted into evidence because these opinions did not fall within the public records exception to the general hearsay rule.[6]

(Footnote 5 Continued)

In light of the court's ruling, Rainey and Knowlton requested an opportunity to review Lieutenant Commander Morgan's report and "leave, in the event we so decide, to call as a witness such person or persons who might not have been called at this trial, but who could present evidence concerning that conclusion [that pilot error was the "most probable cause" of the crash] and the trustworthiness of it." The district court granted the request.

[6]The following opinions were admitted into evidence:

1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

* * *

7. The most probable cause of the accident was the pilots failure to maintain proper interval.

[1-3] To be admissable, the excerpts from Lieutenant Commander Morgan's report [1527] must satisfy the hearsay exception for public records and reports. *See* Fed.R. Evid. 803(8). Rule 803(8) provides a hearsay exception in civil actions for "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Lieutenant Colonel Habermacher, with authorization from the Manual of the Judge Advocate General § 0902, at 9-3 to -5, appointed Lieutenant Commander Morgan to conduct an investigation into the circumstances surrounding the aircraft accident. Lieutenant Commander Morgan's report, since it was prepared in conjunction with an authorized Judge Advocate General investigation, is a public record. Moreover, because no evidence was introduced to show that the report lacked trustworthiness, we find that the report was indeed trustworthy.[7] Thus, the factual findings contained in the report are admissible under Rule 803(8).

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[7]The Advisory Committee on the Proposed Rules notes that Fed.R.Evid. 803(8) "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present." Fed.R.Evid. 803(8) advisory committee note. Thus, the burden was upon Rainey and Knowlton to show that the report was inadmissible because its sources of information or other relevant circumstances indicated a lack of trustworthiness. *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir. 1978) (citing *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975)). That burden was not met here.

Rainey and Knowlton argue that they were unable to meet their burden because they were surprised by the district court's ruling the day before trial admitting into evidence Lieutenant

[4] Cases interpreting Rule 803(8), however, disclose a difference of opinion as to the meaning of "factual findings." *Compare Complaint of American Export Lines, Inc.*, 73 F.R.D. 454, 458 (S.D.N.Y. 1977) (evaluative conclusions or opinions are not "factual findings"); *with Complaint of Paducah Towing Co.*, 692 F.2d 412, 420 (6th Cir. 1982) (evaluative reports are admissable as "factual findings" if based upon circumstantial evidence) (citation omitted).[8] In deciding how to interpret "factual findings" in the context of this

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(Footnote 7 Continued)

Commander Morgan's opinions. But Rainey and Knowlton knew months before trial that the defendants would seek to admit Lieutenant Commander Morgan's report into evidence. Still, Rainey and Knowlton made no effort to attack the qualifications of Lieutenant Commander Morgan or the methodology he employed in conducting the investigation. In fact, when the trustworthiness of the report was discussed during the pretrial conference, Rainey and Knowlton admitted that there was no evidence to indicate that the report was untrustworthy.

On July 10, 1984 when the judge decided to admit the opinions into evidence, he granted Rainey and Knowlton leave to review the report and, if they so chose, to present evidence concerning the trustworthiness of the opinions. Rainey and Knowlton presented no such evidence, and did not seek a continuance.

Thus, in light of the fact that there was no evidence presented to show that the report lacked trustworthiness we agree with the district court in finding that the report was trustworthy.

[8]The legislative history of the Rule reveals the origins of the conflict. The House Committee on the Judiciary intended that " 'factual findings' be strictly construed and that evaluations or conclusions contained in public reports shall not be admissible under this Rule." H.R.Rep. No. 93-650, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S.Code Cong. & Ad.News 7075, 7088. On

case, we are bound by the Fifth Circuit's interpretation in *Smith v. Ithaca Corp.*, [1528] 612 F.2d 215 (5th Cir. 1980).[9] In *Smith*, the Fifth Circuit considered the admissibility of a Coast Guard Marine Board of Investigation Report and found that the "evaluative conclusions and opinions of the Coast Guard Marine Board of Investigation contained in the report should not have been admitted into evidence." *Id.* at 222. The Fifth Circuit noted that:

> the language of Rule 803 suggests that "factual findings" defines something other than "opinions" and "diagnoses" which are admissible under Rule

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(Footnote 8 Continued)

other hand, the Senate Committee on the Judiciary took "strong exception to this limiting understanding of the application of the rule." S.Rep. No. 93-1277, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S.Code Cong. & Ad.News 7051, 7064. The Senate Judiciary Committee recommended a liberal interpretation of "factual findings" so as to include "evaluative reports." *Id.* The Advisory Committee on the Proposed Rules also suggested that "factual findings" might encompass evaluative reports. *See* Fed.R.Evid. 803(8) advisory committee note.

[9]The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

801(d)(1)(A) and admissible against Knowlton as an adoptive admission under Fed.R.Evid. 801(d)(2)(B). Mr. Larry sought to question Rainey about paragraph five of the letter. Rainey and Knowlton contend that Rainey's statement in paragraph five should have been ruled admissible under Fed.R.Evid. 801(d)(1)(B) as "a prior consistent statement made by him offered to rebut an implied or express charge that in other parts of his letter he had made statements inconsistent with his trial theory." Brief for Appellants at 28-29. We agree.

> 803(6) when contained in the record of "a regularly conducted business activity." Rule 803(8), although similar to Rule 803(6), substitutes the term "factual findings" for "opinions" and "diagnoses." Since these terms are used in similar context within the same Rule, it is logical to assume that Congress intended that the terms have different and distinct meanings.

612 F.2d at 221-22 (citations omitted). Thus, while the defendants urge us to follow "[t]he prevailing view . . . that all evaluative conclusions are within the scope of Rule 803(8)(C)," *Walker v. Fairchild Industries*, 554 F.Supp. 650, 653 (D.Nev. 1982) (citations omitted); *see also Cohen v. General Motors Corp.*, 534 F.Supp. 509, 512 (W.D.Mo. 1982) ("it appears that the more expansive reading [of Rule 803(8)] is gaining favor") (citations omitted), we are not free to do so. The Fifth Circuit in *Smith* clearly launched this court's precedent in a different direction, a direction we must follow. We therefore hold that the district court erred in admitting into evidence the evaluative conclusions and opinions contained in Lieutenant Commander Morgan's report.

Having concluded that the district court erred in admitting into evidence these evaluative conclusions and opinions, we must now determine whether this error was harmless. *See Collins v. Wayne Corp.*, 621 F.2d 777, 782 (5th Cir. 1980). We hold that it was not.

[5] Several of Lieutenant Commander Morgan's opinions touched on the cause of the aircraft crash—the ultimate issue the jury was to decide. These opinions were submitted to the jury without ever having been tested by cross-examination. Moreover, the defendants

were able to capitalize on the improper admission of these opinions by highlighting the opinions to the jury during closing argument. The jury returned a verdict for the defendants but the improper admission of Lieutenant Commander Morgan's opinions may have influenced this verdict. The admission of these opinions, therefore, cannot be considered harmless. The district court committed reversible error; Rainey and Knowlton must be afforded a new trial.

III.

Another issue raised by this appeal is whether the district court improperly restricted Rainey's trial testimony. A.H. Toothman, counsel for Beech Aircraft Corporation, called Rainey as an adverse witness. Rainey was questioned about the letter he had written to Lieutenant Commander Morgan about the "aircraft mishap." The questions concerned paragraphs two and four of the letter. In paragraph two, Rainey had written that before the training exercise, his wife, Lieutenant Commander Rainey, was under "unnecessary" pressure. According to Rainey, his wife had attempted to cancel the exercise "[o]n three separate occasions," and "was observed to terminate [one] conversation in an uncharacteristically heated and disgusted manner." In paragraph four, Rainey had written that the aircraft piloted by his wife violated "pattern integrity . . . as it turned crosswind without proper interval." [1529] Rainey had also admitted that either his wife or Ensign Knowlton "react[ed] instinctively and abruptly by initiating a hard right turn, away from [the aircraft piloted by Lieutenant Colonel Habermacher]." Because these statements tended to support the defendants' theory that pilot error led to the crash, the district court,

over Rainey and Knowlton's objection, permitted Mr. Toothman's inquiry.

During Rainey's cross-examination, however, the district court sustained the defendants' objection to the following question propounded by Dennis K. Larry, counsel for Rainey and Knowlton: "In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably [sic] primary cause of this mishap was rollback?" The district court did not allow the question, holding that the question improperly sought to elicit an opinion from a non-expert witness. On appeal, Rainey and Knowlton argue that the district court improperly excluded Rainey's testimony.[10] We agree.

A district court's evidentiary rulings are discretionary and "will not be disturbed on appeal absent a clear showing of an abuse of discretion." *United States v. Russell*, 703 F.2d 1243, 1249 (11th Cir. 1983) (citations omitted). Under this standard, we must conclude that the district court committed reversible error in limiting Rainey's testimony.

[10]Federal Rule of Evidence 103(a)(2) cautions that error may not be predicated upon a ruling excluding evidence unless "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." *United States v. Winkle*, 587 F.2d 705, 710 (5th Cir.) (quoting Fed.R.Evid. 103(a)(2)), *cert. denied*, 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979); *see also* 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶103[03] (1985). While Rainey and Knowlton failed to make an offer of proof indicating the substance of Rainey's excluded testimony, the substance of the testimony was readily apparent from the language of the question the defendants objected to.

Federal Rule of Evidence 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106 is based on the "rule of completeness," and seeks to avoid the unfairness inherent in "the misleading impression created by taking matters out of context."[11] Fed.R.Evid. 106 advisory committee note.

Here, Rainey was questioned about a letter he had written to Lieutenant Commander Morgan. The defendants questioned Rainey about several statements in this letter that, in isolation, seemed to support the defendants' position that pilot error caused the crash. Mr. Larry, counsel for Rainey and Knowlton, sought to place these statements in perspective by questioning Rainey about paragraph five of the letter. In paragraph five, Rainey had concluded that "[t]he most probale [sic] primary cause factor of this aircraft mishap is a loss of useful power (or rollback) caused by some form of pneumatic sensing/fuel flow malfunction." This statement would have placed the prior statements in context and clearly rebutted the misleading impression created by the prior statements alone.

[6-8] The court, therefore, erred in permitting the defendants to examine Rainey about portions of his

[11]Technically, Rule 106 is limited in its application to instances when a party introduces a writing or recorded statement into evidence. Here, we find the defendants' questions concerning Rainey's letter tantamount to the introduction of the letter into evidence. We therefore apply the concerns of the Rule—fairness and completeness—to this case.

letter while prohibiting cross-examination about other relevant portions.[12] Because paragraph five of the letter would have harmonized the prior [1530] statements with Rainey's stance at trial, the jury was given an incomplete and misleading impression of Rainey's position. Under the "rule of completeness" embodied in Rule 106, the limitation of Rainey's testimony was thus inherently unfair and an abuse of discretion. Rainey and Knowlton are entitled to a new trial.

IV.

We hold that the trial judge committed reversible error in 1) admitting into evidence the evaluative conclusions and opinions contained in Lieutenant Commander Morgan's investigative report and 2) limiting Rainey's trial testimony. We therefore reverse the judgment entered against Rainey and Knowlton and remand for a new trial.

REVERSED AND REMANDED.

JOHNSON, Circuit Judge, concurring specially:

I concur with the panel's opinion in this case. I write separately to urge that, while we are clearly bound by *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), to hold that the evaluative conclusions contained in Lieutenant Commander Morgan's report are not

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[12]The district court's limitation of Rainey's testimony was erroneous for another reason as well. As Rainey and Knowlton noted, the district court permitted the defendants' inquiry into Rainey's letter, finding the statements in the letter admissible against Rainey as a prior inconsistent statement under Fed.R.Evid.

admissible under Fed.R.Evid. 803(8)(c), our interpretation of this rule is ripe for reconsideration.

Smith is an anomaly among the circuits. The majority view favors broad admissibility under Rule 803(8)(c)'s "factual findings" standard. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-301 (4th Cir. 1984) ("[I]t is well established that the phrase should be interpreted broadly"). Weinstein's evidence treatise advocates such a reading, *Weinstein on Evidence* § 803(8)[03] (1985) ("[i]f the report states a conclusion that would be helpful—and is reliable—it should be admitted"), and the Advisory Committee's Note may be read as consonant with this interpretation, *Id.*

Broad admissibility releases trial judges from the duty to draw sometimes arbitrary lines between fact and opinion, and focuses the court's inquiry instead on the trustworthiness and relevance of the reports in question. This case presents an appropriate opportunity for reconsideration of this critical evidentiary issue by the full Court.

(Footnote 12 Continued)
801(d)(1)(A) and admissible against Knowlton as an adoptive admission under Fed.R.Evid. 801(d)(2)(B). Mr. Larry sought to question Rainey about paragraph five of the letter. Rainey and Knowlton contend that Rainey's statement in paragraph five should have been ruled admissible under Fed.R.Evid. 801(d)(1)(B) as "a prior consistent statement made by him offered to rebut an implied or express charge that in other parts of his letter he had made statements inconsistent with his trial theory." Brief for Appellants at 28-29. We agree.

[833]

John C. RAINEY, individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant.

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant.

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft Of Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

United States Court of Appeals,
Eleventh Circuit.

May 27, 1986.

* * *

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 25, 1986, 11th Cir., 1986, 784 F.2d 1523)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc.

IT IS ORDERED that the above-consolidated causes shall be reheard by this Court en banc *without* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs. The previous panel's opinion is hereby VACATED.

[1498]

John C. RAINEY, individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant.

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant.

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

United States Court of Appeals,
Eleventh Circuit.

Sept. 22, 1987.

* * *

[1499] Before RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDMONDSON, Circuit Judges.

PER CURIAM:

This case was taken *en banc* for the purpose of reconsidering controlling authority in this Circuit concerning the admissibility in evidence of an opinion expressed in an investigative report of an airplane crash. The Court is evenly divided on the issue, however, so that the controlling authority remains as set forth in the panel decision. Since the Court is unanimous in upholding the panel's decision on the other evidentiary issue which requires a reversal for a new trial, the effect of this *en banc* procedure is to reinstate the panel opinion. *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523 (11th Cir. 1986). This opinion will simply review the case and the effect of this decision.

[1500] Lieutenant Commander Barbara Ann Rainey, a flight instructor with the United States Navy, and her student, Ensign Donald Bruce Knowlton died on July 13, 1982 in a fiery airplane crash while practicing landings and takeoffs at Middleton Field, Alabama. Their spouses, John Charles Rainey ("Rainey") and Rondi M. Knowlton ("Knowlton") sought money damages under the Florida Wrongful Death Act, Fla. Sta.Ann § 768.16-.27 in district court. The jury returned a verdict against the plaintiffs.

At trial, the only disputed issue was the cause of the fatal crash. Lieutenant Colonel David I. Habermacher, Jr., with authorization from the Manual of the Judge

Advocate General § 0902, at 9-3 to -5, appointed Lieutenant Commander William C. Morgan, Jr. to conduct an investigation into the circumstances surrounding the aircraft accident. Lieutenant Commander Morgan's report, since it was prepared in conjunction with an authorized Judge Advocate General investigation, is a public record. Because no evidence was introduced to show that the report lacked trustworthiness, the factual findings contained in the report are admissible under Rule 803(8). *Rainey*, 784 F.2d at 1527. In his report, however, Morgan also gave his opinion that pilot error was "[t]he most probable cause of the accident." *Id.* at 1526.

Rainey and Knowlton disagreed with Lieutenant Commander Morgan's opinion. In a letter written to Morgan about the "aircraft mishap," Rainey, also a flight instructor with the United States Navy, concluded that the mishap was not the result of pilot error but more probably "caused by some form of pneumatic sensing/fuel flow malfunction, probably in the fuel control unit." According to Rainey, this malfunction prompted an inflight "power interruption" or "rollback" making it impossible for Lieutenant Commander Rainey to sustain sufficient power to maintain flight.

Because the two people in the plane were killed and the aircraft was almost totally destroyed by fire, the parties relied heavily on opinions developed by expert witnesses. The defendants offered into evidence the opinion contained in the investigative report prepared by Lieutenant Commander Morgan.

[1, 2] Two points are raised on appeal. *First*, plaintiffs contend that John Charles Rainey's testimony

was unduly restricted on cross-examination by his own attorney about his letter to Morgan after counsel for Beech Aircraft Corporation had called Rainey as an adverse witness. The panel opinion fully sets forth the circumstances concerning this issue and concludes the district court should be reversed for two reasons: (1) Fed.R.Evid. 106 requires the court to let Rainey testify as to the whole letter and, (2) the testimony was admissible under Fed.R.Evid. 801(d)(1)(B). *Rainey*, 784 F.2d 1528-30. The Court is unanimous in concluding that the panel opinion is correct in reasoning and result, so no further discussion of the issue is in order here.

Second, Rainey and Knowlton appeal the district court's decision to admit into evidence, over their objection, the opinion as to cause of the accident in the investigative report prepared by Lieutenant Commander Morgan. Morgan did not testify at the trial. The panel held that prior precedent of this Court, found in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), requires that the district court be reversed on this point. *Rainey*, 784 F.2d at 1527-28. *Smith* holds that "evaluative conclusions and opinions," such as those contained in Lieutenant Commander Morgan's report, are not admissible. 612 F.2d at 221-22. The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. Judge Johnson specially concurred in the panel opinion, noting that although *Smith* controlled the panel decision, it should be reconsidered *en banc*. *Rainey*, 784 F.2d at 1530.

Although this case was taken *en banc* for the purpose of reconsidering the evidentiary [1501] issue

decided in *Smith*, the Court is evenly divided on the point. Judges Roney, Godbold, Hill, Fay, Vance and Clark would all adhere to *Smith*. Judges Tjoflat, Kravitch, Johnson, Hatchett, Anderson and Edmondson would follow the reasoning suggested in Judge Johnson's concurring opinion and overrule *Smith*.

Since the Court is evenly divided, there is no useful purpose in the publication of opinions setting forth the reasoning of either view. All judges agree that unless *Smith* is changed by the *en banc* court, it controls the issue in the district court. Since it takes a majority of the *en banc* court to change a prior precedent of this Court, *Smith* controls and the panel opinion properly decides the issue.

REVERSED and REMANDED.

TJOFLAT, Circuit Judge, specially concurring, in which JOHNSON, Circuit Judge, joins:

I concur in the en banc court's judgment in this case, reversing the district court because it improperly restricted the cross-examination of John Charles Rainey. The second issue in this case is whether the evaluative conclusions contained in Lieutenant Commander (LCDR) Morgan's investigative report are admissible under Fed.R.Evid. 803(8)(C).[1] I write

[1]Fed.R.Evid. 803(8)(C) provides as follows:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

separately to urge the court to take its place among the majority of our sister circuits, favoring broad admissibility under Rule 803(8)(C)'s "factual findings" standard. Were we to adopt the majority view, I submit that we would hold that the district court in this case properly admitted the evaluative conclusions contained in the investigative report.

I.

On July 13, 1982, LCDR Barbara Ann Rainey, a flight instructor with the United States Navy, and her student, Ensign (ENS) Donald Bruce Knowlton, died in a fiery airplane crash while practicing "touch and go" landings and takeoffs[2] at Middleton Field in Alabama. The day after the crash, Lieutenant Colonel (LCOL) Habermacher of the United States Marine Corps, the Commanding Officer of LCDR Rainey's training squadron, under authority of the Manual of the Judge

(Footnote 1 Continued)

* * *

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

[2]A "touch and go" pattern is a training exercise in which, after takeoff, the student circles the airfield in an oval pattern and then lands the aircraft; after landing, the student does not stop the plane but instead accelerates and takes off again.

Advocate General § 0902, at 9-3 to 9-5, appointed LCDR William C. Morgan, Jr. to investigate the aircraft accident.[3]

On September 1, 1982, LCDR Morgan, pursuant to the requirements established [1502] by the Judge Advocate General, filed a written report with LCOL Habermacher. Accompanying LCDR Morgan's investigative report were sixty documents, termed "enclosures," consisting of 159 pages. The enclosures included the following documents: summaries of LCDR Rainey's naval flight and medical records and of ENS Knowlton's aviation and medical records; Training Squadron Three's flight schedule for July 13, 1982; history and inspection records, including an outstanding maintenance action form, of the aircraft that crashed;

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[3]The letter appointing LCDR Morgan to investigate the crash reads, in full, as follows:

From: Commanding Officer, Training Squadron THREE

To: LCDR William C. MORGAN, Jr., USN, 1310

Subj: Investigation to Inquire into the Circumstances Connected with the Aircraft Accident which occurred at approximately 1020, 13 July 1982, approximately two miles southeast of Middleton Airport in Evergreen, Alabama.

Ref: (a) JAG Manual Chapter VI and Section 0902, Chapter IX

1. You are appointed to conduct an informal investigation in accordance with reference (a), as soon hereafter as practicable, for the purpose of inquiring into all circumstances surrounding the aforementioned accident.

2. You will conduct a thorough investigation into all the circumstances surrounding [sic] the accident and report your

air traffic control records; statements from the other instructors and students who were engaged in the "touch and go" exercise, as well as statements from other witnesses to the crash; crash crew rescue reports; aerial photographs of the crash site; casualty reports; the engineering investigative report on the aircraft's engine; photographs of the plane's wreckage; statements

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(Footnote 3 Continued)

findings of fact, opinions and recommendations as to the following:

a. The cause of the accident.

b. The possibility of administrative or disciplinary action.

c. Any claims for or against the U.S. Navy resulting therefrom.

d. Be advised that no statement taken by you need be subscribed under oath.

3. By copy of this appointing letter, the squadron Administrative Department is directed to furnish you assistance in preparing the report of your investigation.

4. This report will be completed no later than 13 August 1982. If additional time is required, you will submit in writing to the Commanding Officer the reasons for and the amount of additional time required.

/s/ D.I. HABERMACHER, JR.

On August 12, 1982, LCDR Morgan "requested that the due date for the informal investigation directed by reference (a) be extended for 14 days subsequent to the receipt of the autopsy protocol and toxicology reports and the results of the engineering investigation." On August 13, 1982, LCOL Habermacher approved LCDR Morgan's request.

from the spouses of the crash victims; diagram of the Middleton Field traffic pattern; and copies of the autopsy protocol and toxicology reports of LCDR Rainey and ENS Knowlton. Based on the sixty enclosures and on his investigation, LCDR Morgan prepared a six-page summary, including a preliminary statement, findings of fact, opinions, and recommendations. That summary is reproduced here in full:

PRELIMINARY STATEMENT

1. As directed by enclosure (1) and in accordance with reference (a), an informal investigation was conducted into the circumstances surrounding the aircraft accident which occurred Southeast of Middleton Airport near Evergreen, Alabama, on 13 July 1982.

2. All reasonably obtainable evidence has been compiled and examined during the course of the investigation and all directives of the convening authority have been met. Certain real evidence collected by the Aircraft Accident Board was also obtained, however, considerable care was taken to ensure a separate and accurate investigation.

3. All claims and potential claims for damages by landowners have been investigated. The original claim of Mr. William W. Ward has been hand carried to Naval Legal Service, Pensacola, Florida. No estimates were required with this claim based on a phone conversation with LCDR G.F. Indest of the Naval Legal Service in Pensacola, Florida. The other property owner involved, Mr. Roger Warrick of Gauiter, Mississippi, has been

notified of the accident and furnished Standard Form 95 by registered mail.

4. Several witnesses were found that heard the radio transmissions and saw the aircraft just prior to the crash. They all seemed rational and observant. Witnesses interviewed were not designated as parties to the investigation and all were advised of the nature of the JAG investigation.

5. The unusual length of time required to complete this investigation was due to the delay in receiving the autopsy reports on the two pilots and the delay in receiving the engineering investigation on the engine of aircraft 3E955. Additional delays were due to the research required to validate points brought out in the engineering investigation.

FINDING OF FACT

1. At approximately 1020 local on 13 July 1982, a U.S. Navy T-34C aircraft, bureau [1503] number 160955, piloted by LCDR Barbara A. Rainey crashed approximately two miles Southeast of Middleton Airport near Evergreen, Alabama, (enclosure (3)).

2. LCDR Barbara A. Rainey, 558-72-0652, USNR, reported to Training Squadron THREE on 16 November 1981, (enclosure (4)). At the time of the accident LCDR Rainey was fully NATOPS qualified (Naval Air Training and Operation Procedures Standardization Program) and Instrument qualified (enclosure (5)) as well as being a qualified familiarization instructor, (enclosure (6)). As of 12 July 1982, LCDR Rainey had accumulated 1331 total flight hours of which 209 were

logged in the T-34C aircraft. LCDR Rainey had logged 96.2 hours during the 90 days preceeding [sic] the accident, (enclosure (7)). LCDR Rainey's Aviator's Log Book indicated no record of previous accidents or flight violations, (enclosure (8)).

3. ENS Donald B. Knowlton, 548-04-6268, USNR, was on active duty and checked into Training Squadron THREE on 24 May 1982 for duty as a Student Naval Aviator, (enclosure (9)). He had an average flight grade of 2.94 and had accumulated 4.5 hours in the T-34C aircraft, (enclosure (10)).

4. LCDR Rainey was physically qualified for flight duty and was in a flight status on 13 July 1982, (enclosure (11)).

5. ENS Knowlton was physically qualified for flight duty and was in a flight status on 13 July 1982, (enclosure (12)).

6. LCDR Rainey and ENS Knowlton were scheduled to fly Familiarization Flight Four at 0645 on 13 July 1982 by Training Squadron THREE's flight schedule authorizing the flight, (enclosure (13)).

7. Aircraft 160955, a T-34C, was accepted by the Navy on 26 September 1978. Inspection of the aircraft records, history, and logs revealed that all required maintenance inspections and technical directives had been complied with, (enclosure (14)). There was one outstanding discrepancy, the air-conditioning ground blower door spring was broken, (enclosure (15)).

8. Aircraft Technical Directive No. T-34C-017 which was designed to provide a manual back-up system for fuel metering, (enclosure 16)), was not installed, (enclosure 14)). Although much has been written about the need for a manual fuel control, (enclosures (17), (18), (19), (20) and (21)), it is still not installed in the T-34C aircraft, (enclosure (14)).

9. LCDR Rainey and ENS Knowlton were issued aircraft 160955 and LCDR Rainey signed the acceptance sheet thereby assuming the responsibility of pilot in command, (enclosure (22)).

10. Review of North Whiting Tower traffic control strips for 13 July 1982 show that aircraft 160955 (3E955) departed North Whiting Field at 0915 local under VFR conditions, (enclosure (23)).

11. The weather observed indicated no conditions that would have a direct effect on the flight, (enclosure (24)). Weather in the Middleton pattern was excellent with no clouds, visibility 5 miles or more, and winds light and from the south, (enclosures (25), (26), (27) and (28)).

12. At approximately 1001, 3E955 entered the pattern at Middleton Field for Runway 18. At least four approaches were flown with a minimum of two "touch and go's" completed prior to the accident, (enclosure (28)).

13. At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned, (enclosures (25), (27), (29), (30), (31) and (32)).

14. Upon receiving notification of a crash and seeing smoke to the southeast of Middleton Field, the crash crew immediately began transit to the crash site, (enclosures (27), (28) and (29)).

15. The [wreckage] of 3E955 crashed into a farmer's field of cutover timber with scattered trees in the area. The area has slightly rolling hills with a small dirt road passing near the crash site, enclosure (41)).

16. 3E955 crashed on property owned by Mr. Roger Warrick. Transit to the crash [1504] site required that the crash crew and other vehicles cross property owned by Mr. William W. Ward, (enclosure (42)).

17. During transit to the crash site, the crash crew had difficulty in locating the [wreckage] due to the muddy road conditions and the circuitous route required to go around a small stream and follen [sic] trees. Additionally, there were no current, detailed maps of the local area available to the crash crew. 3E467, piloted by LCDR Richard E. Blake, was over the crash site and assumed on scene command and attempted to direct the crash crew to the [wreckage], (enclosures (27), (28), (31) and (33)).

18. ABH1 R.S. Scribner stated that at approximately 1022 local, he stopped the crash truck and picked up a civilian who assisted in locating the [wreckage] of 3E955, (enclosure (28)).

19. LT Ted J. Choley stated that at approximately 1030 local, he received a call from LT Will Carpenter on base

radio stating that there was an accident at Middleton Field, (enclosure (36)).

20. At 1035 local, North Whiting Field operations was notified of a possible aircraft accident near Middleton Field, (enclosure (37)).

21. Upon arrival at the [wreckage] at 1040 local, the crash crew immediately began efforts to extinguish the fire using AFFF (lite water) and attempted to locate survivors. No response was heard to ABH1 Scribner's call to crewmembers of the aircraft. The burned bodies of both pilots were noted at this time, (enclosures (27), (28), (34) and (35)).

22. When all the AFFF (lite water) on the truck was depleted, the crash crew used all of the portable fire extinguishers on the truck in an attempt to put out the fire. When this failed, they resorted to shoveling dirt on the fire in an attempt to smother it, (enclosures (27), (28), (31), (34) and (35)). At 1042 local, all fires were extinguished with the exeption of a magnesium fire which the crash crew was unable to put out, (enclosure (38)).

23. LCDR Rainey sustained a lethal neck injury at impact but bodily functions continued for an undetermined period, (enclosures (52) and (55)).

24. ENS Knowlton was killed instantly due to massive head injuries sustained at impact, (enclosures (52) and (56)).

25. At some undetermined point in the crash sequence, the rotary buckle holding the shoulder straps of the from [sic] cockpit harness failed, (enclosure 50)).

26. At some point during the flight or the subsequent crash, a LPA (life preserver assembly) inflation lever was moved to the activated position, (enclosure (51)).

27. At the time of impact, the engine of 3E955 was operating but was operating at reduced power, (enclosure (48)).

28. At 1050 local, HT-18 launched aircraft 171 as a SAR (search and rescue) mission to Middleton Field, (enclosure (39)). The aircraft arrived at the crash site at 1125 local and assumed on scene command from 3E467. 3E467 was relieved from communications relay duties at 1130 local, (enclosure (33)).

29. Upon landing at the site, the crew of aircraft 171 was informed that there were no survivors, (enclosures (43), (44) and (45)).

30. At 1050 local, HC-16 was notified by phone of an aircraft accident near Middleton Field. At 1105 local, a UH-1N launched and proceeded to the crash site, arriving there at 1150 local. Upon landing, HC-16 was requested to transport the bodies of the victims to NARMC (Naval Aerospace Regional Medical Center). The remains of the pilots were removed from the [wreckage], placed in body bags, and moved to the helicopter. Takeoff from the crash site was at 1430 local, and arrival at NARMC was at 1515 local. The remains were taken from the helicopter and placed in an

ambulance for transportation to the hospital, (enclosure (40)).

31. An Engineering Investigaton was conducted on the engine of aircraft 160955 by the Naval Air Rework Facility, NAS Pensacola, Florida, (enclosure (48)).

[1505]

OPINIONS

1. Examination of the findings of fact, aircraft history, and inspection records indicate [sic] no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

5. Because both pilots were killed in the crash and because of the nearly total destruction of the aircraft by fire, it is almost impossible to determine exactly what happened to Navy 3E955 from the time it left the runway on its last touch and go until it impacted the ground. However, from evidence available and the information gained from eyewitnesses, a possible scenario can be constructed as follows:

a. 3E955 entered the Middleton pattern with ENS Knowlton at the controls attempting to make normal landings.

b. After two unsuccessful attempts, LCDR Rainey took the aircraft and demonstrated two landings "on the numbers". After getting the aircraft safely airborne from the touch and go, LCDR Rainey transferred control to ENS Knowlton.

c. Due to his physical strength, ENS Knowlton did not trim down elevator as the aircraft accelerated toward 100 knots; in fact, due to his inexperience, he may have trimmed incorrectly, putting in more up elevator.

d. As ENS Knowlton was climbing to pattern altitude, he did not see the aircraft established on downwind so he began his crosswind turn. Due to ENS Knowlton's large size, LCDR Rainey was unable to see the conflicting traffic.

e. Hearing the first call, LCDR Rainey probably cautioned ENS Knowlton to check for traffic. Hearing the second call, she took immediate action and told ENS Knowlton she had the aircraft as she initiated a turn toward an upwind heading.

f. As the aircraft was rolling from a climbing left turn to a climbing right turn, ENS Knowlton released the stick letting the up elevator trim take effect causing the nose of the aircraft to pitch abruptly up.

g. The large angle of bank used trying to maneuver for aircraft separation coupled with the abrupt pitch up

caused the aircraft to stall. As the aircraft stalled and went into a nose low attitude, LCDR Rainey reduced the PCL (power control lever) toward idle. As she was rolling toward wings level, she advanced the PCL to maximum to stop the loss of altitude but due to the 2 to 4 second lag in engine response, the aircraft impacted the ground before power was available.

6. Although the above sequence of events is the most likely to have occurred, it does not change the possibility that a "rollback" did occur.

7. The most probable cause of the accident was the pilots [sic] failure to maintain proper interval [between LCDR Rainey's aircraft and another aircraft in the pattern].

8. There are many items that are considered as possible contributing factors to the accident. They are listed as follows:

a. The design of the aircraft which limits forward visability [sic] when in a climb.

b. The performance of the engine from idle to max power and the associated lag.

c. The relative size of the individuals, ENS Knowlton's size and strength could enable him to overpower LCDR Rainey in a panic situation.

d. The possibility that an LPA (life preserver assembly) was inflated at a critical time.

e. The inability of early stage students to trim correctly.

9. The Middleton Crash Crew and the RDO (Runway Duty Officer) acted in a very professional manner.

[1506]

RECOMMENDATIONS

1. That the claim of Mr. William W. Ward be honored.

2. That a flight for the NATOPS syllabus be designed to familiarize all pilots with the different type stalls that may be encountered.

3. That landing lights be used in the landing pattern to enhance visibility of aircraft established downwind.

4. That every effort be made to incorporate Aircraft Technical Directive No. T-34C-0147 at the earliest possible date.

/s/ W.C. Morgan, Jr.

In letters to the Judge Advocate General of the United States Navy, the following officers endorsed LCDR Morgan's investigative report: the Commanding Officer of Training Squadron Three (LCOL Habermacher), the Commanding Officer of Training Squadron Five, the Chief of Naval Education and Training, and the Chief of Naval Operations. In addition, two other officers sent endorsement letters to LCOL Habermacher. Although a few endorsers took issue with some of LCDR Morgan's recommendations,

none disagreed with any of his opinions that were admitted into evidence.

Disagreeing with LCDR Morgan's opinion that pilot error was "[t]he most probable cause of the accident," the spouses of the crash victims, John Charles Rainey and Rondi M. Knowlton, filed separate suits on April 15, 1983 in the district court against the manufacturer of the aircraft, Beech Aircraft Corporation, the manufacturer of the aircraft's engine, Pratt & Whitney Canada, Inc., and the Navy's contract maintenance service for the aircraft, Beech Aerospace Services, Inc.[4] Each plaintiff alleged negligence and strict product liability causes of action and sought money damages under the Florida Wrongful Death Act, Fla.Stat. §§ 768.16-.27 (1985). Specifically, Rainey and Knowlton each alleged that "[t]he aircraft and engine were equipped with a pneumatic fuel control system which was defective in its design and/or manufacture in that it was prone to malfunction in such [a] way as to cause 'power interruptions' . . . such that the pilot of the subject aircraft was unable to sustain sufficient power to maintain flight." The spouses alleged that Beech Aircraft and Pratt & Whitney were negligent in designing and manufacturing the aircraft and engine in that they knew or should have known of the defects; they alleged that Beech Aerospace Services, Inc. was negligent when it issued to LCDR Rainey an aircraft

[4]Rainey brought suit individually, as the personal representative of his wife's estate, and on behalf of his minor children, Cynthia Ann Rainey and Katharine Marie Rainey. Knowlton brought suit individually, as the personal representative of her husband's estate, and on behalf of her minor children, Ramsey Nia Knowlton and Branigan McDermott Knowlton.

that it knew or should have known had a defective fuel control system. Both Rainey and Knowlton sought punitive damages against the defendants, contending that they acted "in reckless disregard for the safety of decedent and other persons who they knew would fly the aircraft." At a pretrial conference on March 20, 1984, the district court granted Beech Aircraft's motion to consolidate the two cases for all purposes, including trial.

During that same pretrial conference, the district court held that LCDR Morgan's investigative report was trustworthy and that his factual findings, but not his opinions or conclusions, would be admissible. On July 10, 1984, during a hearing held the day before trial, the district court reversed in part its prior ruling on the admissibility of LCDR Morgan's report. The court reiterated that "the defendants [could] place in evidence before the Jury the findings of facts, 31 in number, that were in the JAG report." The court further held "that the opinions attached to those 31 findings may also be admitted, to the extent that they are opinions and conclusions." According to the district court, however, not every "opinion" in LCDR Morgan's report was admissible under Fed.R.Evid. 803(8)(C):

> Paragraph five is nothing but a possible scenario, as it's called, and would not [1507] be allowed in. Paragraph eight talks about possible contributing factors and it would not be allowed in. Paragraph nine, which says somebody acted in a very professional manner, would not be allowed in because it is not relevant.

Accordingly, the district court held that paragraph five, eight, and nine of the report's "opinions" section would not be allowed into evidence at trial.[5]

The plaintiffs objected to the district court's new ruling on the admissibility of the JAG report, citing *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980).[6] In light of the court's ruling, the plaintiffs requested an opportunity to review the JAG report for the purpose of offering evidence and witnesses relating to LCDR Morgan's "Opinion" No. 7 (which appears to be based on "Finding of Fact" No. 13): "The most probable cause of the accident was the pilots [sic] failure to maintain proper interval." The district court granted the plaintiffs' request.

The only disputed issue at trial was the cause of the fatal crash. The parties relied heavily on opinions of expert witnesses. The defendants relied in part on excerpts from the opinions contained in LCDR Morgan's investigative report.[7] The following "opinions" from that report were admitted into evidence:

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[5] *See infra* note 7.

[6] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[7] The trial exhibits are not part of the record on appeal. Although the court has before it a complete copy of LCDR Morgan's investigative report, which presumably was included in the record on appeal as an exhibit to a memorandum filed in support of a motion, I can only assume, as the parties agree, that the portions of the report that the district court on July 10, 1984 ruled would

1. Examination of the findings of fact, aircraft history, and inspection records indicate [sic] no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.

4. Thre is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

* * *

7. The most probable cause of the accident was the pilots [sic] failure to maintain proper interval.

(Footnote 7 Continued)

be admissible at trial were actually admitted into evidence. I therefore assume that all 31 of the report's findings of fact were admitted into evidence, along with all of the report's opinions except paragraphs five, eight, and nine. (I also assume that the district court struck the opinion in paragraph six, which deals with the possibility that a "rollback" caused the accident, because that opinion can only be read along with paragraph five, which the district court explicitly held inadmissible during the July 10, 1984 pretrial conference.) Additionally, a colloquy between the trial judge and the parties' lawyers, outside the presence of the jury, indicates that the court also admitted into evidence the maintenance record of the plane that crashed; that record was attached to LCDR Morgan's report.

On July 20, 1984, the jury returned a verdict for the defendants, finding that the deaths of LCDR Rainey and ESN Knowlton were not legally caused by the aircraft's fuel control system, and that there was no negligence on the part of Beech Aircraft, Pratt & Whitney, or Beech Aerospace that legally caused the deaths of LCDR Rainey and ENS Knowlton.

On August 1, 1984, the plaintiffs filed a motion for a new trial, challenging two of the trial judge's evidentiary rulings. The district court denied the motion, and this appeal followed.

A panel of this court reversed the district court, holding that the district court improperly restricted plaintiff Rainey's trial testimony and that it improperly admitted into evidence, contrary to precedent of this court found in *Smith v. Ithaca Corp.*, 612 [1508] F.2d 215 (5th Cir. 1980), the opinions contained in LCDR Morgan's investigative report. We took the case en banc to consider both evidentiary issues, thereby vacating the panel's opinion and judgment by operation of law. *See* 11th Cir.R. 26(k). I write now to urge that the en banc court reject the holding of *Smith* and affirm the district court's ruling admitting into evidence the opinions contained in LCDR Morgan's investigative report.

II.

To be admissible, an investigative report of the sort prepared by LCDR Morgan must satisfy the hearsay exception for public records and reports found in Fed.R.Evid. 803(8)(C). That rule provides a hearsay exception for "[r]ecords, reports, statements, or data

compilations, in any form, of public offices or agencies, setting forth . . . in civil actions and proceedings . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Fed.R.Evid. 803(8)(C). As to the rule's public record requirement, the en banc court holds that LCDR Morgan's investigative report is a public record: it was prepared in conjunction with an authorized Judge Advocate General investigation.

As to the rule's caveat that certain findings of a public record are admissible unless the sources of the information that lead to the findings or other circumstances indicate that such sources were untrustworthy, there is no evidence in the record that would indicate that the sources upon which LCDR Morgan relied lacked trustworthiness. The burden was on the plaintiffs to show that the report was inadmissible if they believed that its sources of information or other circumstances indicated that the reported lacked trustworthiness. *See* Fed.R.Evid. 803(8) advisory committee's note (Rule 803(8) "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present"); *see also Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3rd Cir. 1978) (citing *Muncie Aviation Corp. v. Party Doll Fleet, Inc.* 519 F.2d 1178 (5th Cir. 1975)). Although the plaintiffs knew months before trial that the defendants would seek to admit LCDR Morgan's investigative report into evidence, they attacked neither the qualifications of LCDR Morgan nor the methodology he employed. During the July 10, 1984 pretrial conference, the plaintiffs requested leave to review the report to determine whether to present

evidence bearing on the trustworthiness of the report's opinions. The district court granted the plaintiffs' request, but they presented no evidence challenging the report's trustworthiness and did not seek a continuance to gather such evidence. The plaintiffs have not met their burden. For these reasons, this court cannot, and does not, set aside the district court's findings that the report is trustworthy.

The issue that divides us is whether "factual findings resulting from an investigation," Fed.R.Evid. 803(8)(C), encompasses evaluative conclusions derived from the report. The panel that heard this appeal answered in the negative, concluding that it was bound by the former Fifth Circuit's interpretation of "factual findings" in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980). *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1527-28 (11th Cir. 1986) (per curiam). In a separate concurring opinion, Judge Johnson described *Smith* as "an anomaly among the circuits" and urged the en banc court to reject the *Smith* court's reasoning and to adopt a rule favoring broad admissibility of evaluative conclusions contained in investigative reports that are trustworthy public records and are relevant to the issues in question. *See id.* at 1530 (Johnson, J., concurring specially). I agree with Judge Johnson.

III.

In *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), the former Fifth Circuit considered the admissibility under Fed.R.Evid. [1509] 803(8)(C) of excerpts from a Coast Guard Marine Board of Investigation Report. Acknowledging that the

legislative history of the rule does not unambiguously resolve the issue and that the federal courts have disagreed over the appropriate interpretation of "factual findings", the *Smith* court reached this conclusion:

> [T]he language of Rule 803 suggests that "factual findings" defines something other than "opinions" and "diagnoses" which are admissible under Rule 803(6) when contained in the records of "a regularly conducted business activity." Rule 803(8), although similar to Rule 803(6), substitutes the term "factual findings" for "opinions" and "diagnoses." Since these terms are used in similar context within the same Rule, it is logical to assume that Congress intended that the terms have different and distinct meanings.

Id. at 221-22 (citing *Complaint of Am. Export Lines, Inc.*, 73 F.R.D. 454, 457 (S.D.Y.Y. 1977)).[8] Accordingly, the *Smith* court held that "evaluative conclusions and opinions of the Coast Guard Marine Board of

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[8]Fed.R.Evid. 803(6) provides as follows:

Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted

Investigation contained in the report should not have been admitted into evidence." *Id.* at 222. In my view, the *Smith* court misinterpreted "factual findings" within the meaning of Rule 803(8)(C), unduly limiting the rule's scope.

A.

A literal reading of Rule 803(8)(C) hardly lends itself to a restrictive interpretation. The rule creates a hearsay exception for trustworthy public reports "setting forth . . . factual findings resulting from an investigation." Fairly read, the rule admits not merely "factual findings," but reports in their entirety, as long as the reports are trustworthy and contain factual findings. After all, this hearsay exception is entitled "public records and reports," not "factual findings set forth in public records." *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1143 (E.D. Pa. 1980) ("The language of 803(8)(C) literally provides for the admission of entire agency reports so long as those reports include, *inter alia*, factual findings. . . ."), *aff'd in relevant part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

(Footnote 8 Continued)

> business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The Advisory Committee Notes support this reading of the rule. The Committee couched its discussion in terms of the admissibility of evaluative reports.[9] Although the Committee understood that the rule "assumes admissibility in the first instance,' it believed that the rule provides "ample provision for escape if sufficient negative factors are present." Fed.R.Evid. 803 advisory committee's note. The Committee offered a nonexclusive list of "[f]actors which may be of assistance in passing upon the admissibility of evaluative reports":

> (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigations? [1510] 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, *id.*, (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co.*, 141 F.2d 568 (10th Cir. 1944); (4) possible motivation problems suggested by *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943).

Fed.R.Evid. 803 advisory committee's note. Notably, the Committee did not even mention the possibility that admissibility would be limited to those portions of evaluative reports that present "factual findings."

The House Judiciary Committee "approved Rule 803(8) without substantive change from the form in

[9]Evaluative reports under Rule 803(8)(C) "are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case." Fed.R.Evid. 803 advisory committee's note.

which it was submitted by the [Supreme] Court." Report of the Committee on the Judiciary, H.R.Rep. No. 650, 93d Cong., 1st Sess. 14 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin.News 7075, 7088. The Committee, however, adopted a somewhat tortured reading of the public records .heresay exception: "The Committee intends that the phrase 'factual findings' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule." *Id.* That reading is tortured not only because it erroneously focuses on the admissibility of factual findings contained in public reports, rather than on, as the Rule says, public records "setting forth . . . factual findings resulting from an investigation," but also because it contorted the meaning of "factual findings."

A "finding" is "[a] decision upon a question of fact reached as the result of a judicial examination or investigation by a court, jury, referee, coroner, etc." *Black's Law Dictionary* 569 (5th ed. 1979). That is, a finding "commonly applies to the result reached by a judge or jury." *Id.* In other words, a "finding" or a "finding of fact" refers to the result or conclusion drawn by an investigator, whether it be a fire inspector, judge, or jury, "from facts without exercise of legal judgment." *Id.* The common meaning of finding therefore comports with investigative conclusions (i.e., results derived from the examination of facts), but not with idle speculation or legal conclusions: "a finding does not include legal conclusions that may have been reached by an investigator and is necessarily something more than a mere recitation of evidence, although we think the term is broad enough to encompass any statement of fact that represents a conclusion on the part of an investigator." *Zenith Radio Corp.*, 505 F.Supp. at 1144 (footnote

omitted). Thus, by way of example, the following investigative (or evaluative) conclusions are "factual findings": whether a traffic light was green or red (there were no eyewitnesses) moments before an automobile accident, *see Baker v. Elcona Homes Corp.*, 588 F.2d 551, 554-59 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S.CT. 2054, 60 L.Ed.2d 661 (1979); whether a public school board had established and maintained an elementary school as a black school for segregative purposes, *see United States v. School Dist. of Ferndale*, 577 F.2d 1339, 1354-55 (6th Cir. 1978); whether a state trooper who fatally shot a man who attacked him acted within the guidelines of the department's Policies and Procedures Manual, *see Perrin v. Anderson*, 784 F.2d 1040, 1046-47 (10th Cir. 1986); whether a state trooper acted contrary to department training when he attempted to handcuff a person while holding a cocked weapon, *see Wilson v. Beebe*, 770 F.2d 578, 589-90 (6th Cir. 1985) (en banc); whether a crewmember of a ship started a fight, *see Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1182-83 (3d Cir.) *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978); whether the captain of a tow boat acted reasonably in mooring the vessel and setting the watch, *see In re Paducah Towing Co.*, 692 F.2d 412, 419-21 (6th Cir. 1982); whether there is a statistically significant link between tampon use and toxic shock syndrome, *see Ellis v. International Playtex, Inc.*, 745 F.2d 292, 299-304 (4th Cir. 1984); and whether a phone company's tariffs were unreasonable and discriminatory, *see Litton Systems, Inc. v. AT & T*, 700 [1511] F.2d 785, 819 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984).

The Senate Judiciary Committee rejected the House Committee's narrow interpretation of "factual

findings," opting instead for the Advisory Committee's view:

> The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

* * *

> The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish[es] sufficient guidance on the admissibility of evaluative reports.

Report of the Committee on the Judiciary, S.Rep. No. 1277, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. Code Cong. & Admin.News 7051, 7064-65.[10]

The Conference Committee did not resolve the differing views of the term "factual findings." The Conference Committee Notes make no reference to the scope of Rule 803(8) or to the meaning of "factual findings." *See Notes of Conference Committee*, H.R. Conf.Rep. No. 1597, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin.News 7098; *see also Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979).

The legislative history as to the admissibility of evaluative conclusions is indeed equivocal. Nevertheless, the Senate's view is more consistent with the other hearsay exceptions and with the general spirit of the Federal Rules of Evidence, and is more easily

[10]The Senate and House versions of Rule 803(8) differed slightly. The Senate version referred to another proposed rule, relating to the admissibility of certain criminal law enforcement records and reports. That reference was deleted by the Conference Committee, which adopted the House's version of the rule. *See* 4 J. Weinstein & M. Berger, *Weinstein's Evidence* 803-23 (1985); *see also Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557 n. 6 (6th Cir.1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979).

justified on policy grounds. *See United States v. AT & T*, 498 F.Supp. 353, 359 (D.D.C. 1980) ("Extrinsic materials indicate that the Rule is most appropriately considered by following the Senate Committee's position.").

Rule 803(6), the regular entries rule, creates a hearsay exception for reports or records "of acts, events, conditions, opinions, or diagnoses . . . if kept in the course of a regularly conducted business activity . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Fed.R.Evid. 803(6). Because Rule 803(6) uses the [1512] terms "opinions" and "diagnoses" whereas Rule 803(8)(C) uses the term "factual findings," the *Smith* court inferred that Congress must have intended that those terms have distinct meanings and, more specifically, that "factual findings" not encompass evaluative conclusions. *See Smith v. Ithaca Corp.*, 612 F.2d 215, 221-22 (5th Cir. 1980). The *Smith* court reached this erroneous result, I believe, because it apparently gave no credence to the Advisory Committee's Note on Rule 803(6).

Tracing the origins of the regular entries rule, the Advisory Committee noted that "[e]ntries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results." Fed.R.Evid. 803 advisory committee's note. The Committee acknowledged, however, that the Commonwealth Fund Act, 28 U.S.C. § 1732, the Uniform Business Records as Evidence Act, Model Code Rule 514, and Uniform Rule 63(13) contained limiting

and ambiguous language with respect to diagnosis, test results, and opinions. Thus, according to the Advisory Committee, "[i]n order to make clear its adherence to the [trend toward freely admitting diagnostic entries,] the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries." Fed.R.Evid. 803 advisory committee's note.[11]

Given this account of why the regular entries rule makes explicit reference to diagnoses and opinions, it strikes me as absurd to cite the language of that rule as support for an argument limiting the scope of "factual findings" within the meaning of the public records rule. The reason that the regular entries rule specifically mentions "diagnoses" and "opinions" has nothing whatsoever to do with why Rule 803(8) employs the term "factual findings." If anything, attributing a severely restricted significance to the phrase "factual findings" would be inconsistent with the regular entries rule: "No legislative history points to any intent on the part of Congress to limit the public records exception [Rule 803(8)] so as to exclude records which had previously qualified for admission pursuant to the business entries exception [Rule 803(6)]." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(8) [03] (1985) (citation omitted).

In addition, "[b]road admissibility [under Rule 803(8)(C)] releases trial judges from the duty to draw

[11]The House Committee Notes, the Senate Committee Notes, and the Conference Committee Notes do not discuss the significance of Rule 803(6)'s use of the terms "opinions" and "diagnoses" or how the scope of those terms differs from the scope of "factual findings," as used in Rule 803(8)(C).

sometimes arbitrary lines between fact and opinion, and focuses the court's inquiry instead on the trustworthiness and relevance of the reports in question." *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1530 (11th Cir. 1986) (Johnson, J., concurring specially); *see also* Fed.R.Evid. 704(a) ("[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier-of-fact."). Thus, consistent with the basic approach that opinions should be admitted when helpful to the trier of fact, *see* Fed.R.Evid. 704 advisory committee's note, trustworthy and relevant evaluative opinions should be admitted under the public records exception of Rule 803(8)(C), as long as jurors can ascertain the significant facts that form the basis of the opinion. *See* 4 J. Weinstein & M. Berger, *supra*, ¶ 803(8) [03].

B.

Broad admissibility of public records containing evaluative conclusions (i.e., normative judgments drawn from the analysis of facts) is good policy because these reports are presumptively reliable. Rule 803(8)(C) is premised on "the assumption that a public official will perform his duty properly [1513] and the unlikelihood that he will remember details independently of the record." Fed.R.Evid. 803 advisory committee's note (citing *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir.1952)). Admission of public records can be justified "by the probability that the officials conducting the investigation (who themselves are under a public duty) will be careful and discriminating in selecting the factual data upon which to rely in reaching their findings and conclusions." G. Lilly, *An Introduction to*

the Law of Evidence 245 (1978). Most investigators under a public duty lack a motive to distort the facts or their conclusions. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir.1984); *Kehm v. Procter & Gamble Mfg.*, 724 F.2d 613, 618-19 (8th Cir.1983); *see also Melville v. American Home Assurance Co.*, 443 F.Supp. 1064, 1112 (E.D.Pa.1977), ("[P]ublic records or reports, by virtue of their being based on legal duty and authority, contain sufficient circumstantial guarantees of trustworthiness to justify their use at trial."), *rev'd on other grounds*, 584 F.2d 1306 (3d Cir.1978).

Dean McCormick offered several other reasons for allowing a trier of fact to receive an investigative report—including the investigator's conclusions based on the facts he has gathered—as evidence:

> The most important reason is time. The officer comes on the scene usually as early as it is feasible to get there. Usually the investigators of the parties come later and the statements are frequently partial and one-sided. The witnesses at the trial have often only a dim recollection of the event, and their testimony rests mostly on their pre-trial refreshment of memory by these statements. The officer is often able to interview witnesses before they have been pulled one way or the other by the parties. The officer, too, is frequently a specialist—a doctor reporting death, a fire marshall investigating a fire—or at least experienced in like investigations, such as a highway patrolman reporting on a collision.

McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 Iowa L.Rev. 363 (1957).

Because the source of these public reports—an investigator operating under authority of law—is presumptively reliable, "there is no reason not to admit the findings simply because they tend towards the conclusory rather than the factual end." *United States v. AT & T*, 498 F.Supp. 353, 360 (D.C.C.1980); *see also Zenith Radio Corp. v. Matsushita Elec. Indus, Co.*, 505 F.Supp. 1125, 1144 (E.D.Pa.1980) ("[F]actual statements need not be formally termed 'findings' in order to come in under 803(8)(C)."), *aff'd in relevant part*, 723 F.2d 238 (3d Cir.1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 583 (1986).

The presumption that evaluative reports of this sort are trustworthy is, of course, rebuttable. Not every public report made pursuant to an investigation authorized by law that contains factual findings will be admissible. Rule 803(8)(C) allows for the admission of evaluative reports "unless the sources of information or other circumstances indicate lack of trustworthiness." Fed.R.Evid. 803(8)(C). In other words, "if sufficient negative factors are present" to indicate that the report is not trustworthy, then it should not be admitted. Fed.R.Evid. 803(8) advisory committee's note. "The factors that may be used to determine admissibility include: (1) the timeliness of the investigation; (2) the special skill or experience of the official; and (3) possible motivation problems." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-01 (4th Cir.1984) (citing Fed.R.Evid. 803(8)(C) advisory committee's note); *see also Perrin v. Anderson*, 784 F.2d 1040, 1047 (10th Cir.1986). The court's consideration of such negative factors provides an exclusionary mechanism sufficient to safeguard against the admission of unreliable

evidence. *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978).

The burden to demonstrate that an investigative report is not reliable is on the party opposing admission of the report. [1514] *Ellis*, 745 F.2d at 301 (citing *Kehm v. Procter & Gamble Mfg.*, 724 F.2d 613, 618 (8th Cir.1983); *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 558 (6th Cir.1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979)). As a practical matter, this makes a good deal of sense:

> Most government sponsored investigations employ well accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered. Rather than requiring the moving party to spend considerable time and money to ensure that the experts who conducted the study are available at trial, it is far more equitable to place that burden on the party seeking to demonstrate why a time tested and carefully considered presumption is not appropriate.

Ellis, 745 F.2d at 301.

C.

Rule 803(8) must be viewed in conjunction with the other rules of evidence. Accordingly, the admissibility of Rule 803(8)(C) public records of an evaluative nature, which in most cases are prepared by experts, should be interpreted broadly so that Rule 803(8)(C) is consistent with Rule 703, which provides that facts forming the basis of an expert's opinion need not themselves be

admissible as long as they are "of a type reasonably relied upon by experts in the particular field." Fed.R.Evid. 703;[12] *see also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1148 (E.D.Pa.1980), *aff'd in relevant part*, 723 F.2d 238 (3d Cir.1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Furthermore, although public records are excepted from the hearsay evidence rule because they are presumed generally to be reliable, the reliability of a particular evaluative report can be tested not only with the trustworthiness inquiry called for by Rule 803(8)(C), but also with the objections permitted by Rules 702 and 705. *See Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978). Rule 702 allows objections to the qualifications of an expert witness,[13] and Rule 705 allows disclosure on cross-examination of facts and data

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[12]Fed.R.Evid. 703 provides in full as follows:

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[13]Fed.R.Evid. 702 provides as follows:

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

underlying an expert's testimony.[14] Of course, an evaluative report admissible under Rule 803(8) may have to be excised in part under Rules 401 and 402, providing that irrelevant evidence is inadmissible,[15] and

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[14]Fed.R.Evid. 705 provides as follows:

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

In *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978) (citation and footnote omitted), the Third Circuit noted the following:

Before these objections [under Rules 702 and 705] may be recognized, however, the party challenging the validity of an official report admitted under 803(8)(C) must come forward with some evidence which would impugn its trustworthiness. To allow objections to be sustained under Rules 702 and 705 without a showing of untrustworthiness would have the practical effect of nullifying the exception to the hearsay rule provided by Rule 803(8)(C).

[15]Fed.R.Evid. 401 provides as follows:

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed.R.Evid. 402 provides as follows:

under rule 403, excluding relevant evidence [1515] on grounds of prejudice, confusion, or waste of time.[16]

In sum, "Rule 803(8) should be interpreted in accord with th[e] treatment of 'opinion' evidence. If the report states a conclusion that would be helpful—and is reliable—it should be admitted." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶803(8)[3](1985) (footnote omitted.) This determination is a matter to be left within the sound discretion of the district court. The court would thus be "free to say, pursuant to Rule 803(8)(C), 'In this particular case and in view of the shaky foundation for the conclusions, I will exclude the report unless you produce the reporting officer.' " *Id.* (quoting McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?* 42 Iowa L.Rev. 363, 369

(Footnote 15 Continued)

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

[16]Fed.R.Evid. 403 provides as follows:

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(1957)). Another way the trial court can safeguard the rights of the party against whose interest the report is being introduced is to comment on the weight of the evidence, *id.*, and to issue an instruction cautioning the jurors against substituting the investigator's judgment for their own, *id.; see also In re Playwood Antitrust Litig.*, 655 F.2d 627, 637 (5th Cir. Unit A Sept.1981), *cert. dismissed,* 462 U.S. 1125, 103 S.Ct. 3100, 77 L.Ed.2d 1358 (1983); *Cohen v. General Motors Corp.*, 534 F.Supp. 509, 512 n. 3 (W.D.Mo.1982).

D.

Finally, I note that the weight of authority is against the reasoning of *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980). In 1976, the Supreme Court noted that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo.* See Fed.Rule Evid. 803(8)(C)." *Chandler v. Roudebush,* 425 U.S. 840, 863 n. 39, 96 S.Ct. 1949, 1961 n. 39, 48 L.Ed.2d 416 (1976) (citation omitted). The *Smith* court made no reference to the Supreme Court's broad reading of Rule 803(8)(C). *See Cohen v. General Motors Corp.*, 534 F.Supp. 509, 512 (W.D.Mo.1982) ("[I]t appears that the Supreme Court has given a broad directive for liberal use of agency findings, somewhat at variance with Judge Wisdom's cautious approach in [*Smith*].").

As Judge Johnson has noted, "*Smith* is an anomaly among the circuits. The majority view favors broad admissibility under Rule 803(8)(C)'s 'factual findings' standard. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-01 (4th Cir.1984) ('[I]t is well established that the phrase should be interpreted

broadly')." *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1530 (11th Cir.1986) (Johnson, J., concurring specially); *see also Perrin v. Anderson,* 784 F.2d 1040, 1046-47 (10th Cir.1986); *Kehm v. Procter & Gamble Mfg.*, 724 F.2d 613, 618-19 (8th Cir.1983); *Litton Systems, Inc. v. AT & T,* 700 F.2d 785, 819 (2d Cir.1983), *cert. denied,* 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984); *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 554-59 (6th Cir.1978), *cert. denied,* 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979); *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978). Even in the Fifth Circuit, *Smith* has not been uniformly followed. *See, e.g., Mac Towing Inc. v. American* [1516] *Commercial Lines,* 670 F.2d 543, 547 (5th Cir.1982) (district court properly admitted Coast Guard accident report that attributed blame in shipping case); *Local Union No. 59, Int'l Bhd. of Elec. Workers v. Namco Elec., Inc.,* 653 F.2d 143, 145 (5th Cir. Unit A Aug. 1981) (findings in NLRB investigative letter admissible under Rule 803(8)(C)); *Garcia v. Gloor,* 618 F.2d 264, 272 (5th Cir.1980) ("The district judge was, indeed, in error in refusing to admit the investigative report and determination of the EEOC."), *cert. denied,* 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). Additionally, courts that have considered the admissibility of JAG reports, similar to the one prepared by LCDR Morgan, under Rule 803(8)(C) have broadly interpreted "factual findings." *See, e.g., Walker v. Fairchild Indus.*, 554 F.Supp. 650, 653 (D.Nev.1982); *Sage v. Rockwell Int'l Corp.*, 477 F.Supp. 1205, 1207-10 (D.N.H.1979); *Schoenborn v. Boeing Co.*, 586 F.Supp. 711, 725, 18 Av. Cas. (CCH) 18,335, 18,344-45 (E.D.Pa.1984).

IV.

A majority of this court agrees that LCDR Morgan's investigative report is a public record and that it is trustworthy for purposes of Rule 803(8)(C). The report is certainly of the sort that the rule contemplates as trustworthy: the report is thorough, as evidenced by the supporting documents totaling 159 pages, and LCDR Morgan's conclusions are credible, having been endorsed by six fellow officers of various ranks. Moreover, the district court gave the plaintiffs ample opportunity to challenge the trustworthiness of the report; nevertheless, the plaintiffs presented no evidence attacking the qualifications of LCDR Morgan or the methodology he employed.

The sole issue that evenly divides this court is whether "factual findings resulting from an investigation," Fed.R.Evid. 803(8)(C), encompasses evaluative conclusions derived from the report. Based on the facts uncovered by his extensive investigation, LCDR Morgan reached several conclusions that the district court admitted into evidence. Finding that the "aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash" (Opinion No. 1), LCDR Morgan eliminated, in effect, a defect in the fuel control system as the cause of the accident. He concluded that based on his investigation there was no contributing command or supervisory error (Opinion No. 2). LCDR Morgan also found that neither LCDR Rainey nor ENS Knowlton had any physical or mental ailments that could have caused the crash (Opinion No. 3). Having eliminated several other possible causes of the crash, and based on

(1) the statements of the other instructors and students engaged in the "touch and go" exercise, (2) air traffic control records, and (3) an analysis of the traffic pattern diagram for Middleton Field, LCDR Morgan concluded that "[t]he most probable cause of the accident was the pilots [sic] failure to maintain proper interval." (Opinion No. 7). In other words, in LCDR Morgan's professional judgment, pilot error caused the crash.

In my view, LCDR Morgan's conclusions that were admitted into evidence at trial are "factual findings" within the common sense meaning of that term and as contemplated by the Advisory Committee and the Senate Judiciary Committee. Moreover, consistent with the overall spirit of the Federal Rules of Evidence, LCDR Morgan's evaluative findings could certainly have been helpful to the jury.

For these reasons, the district court did not abuse its discretion when it admitted portions of LCDR Morgan's "opinions." I would nevertheless reverse the district court, concurring in the en banc court's judgment that the district court improperly restricted the cross-examination testimony of John Charles Rainey.

JOHN C. RAINEY,
DEFENDANTS'ADVERSE WITNESS,
DIRECT EXAMINATION
TRIAL TRANSCRIPT

Q. Good morning, Mr. Rainey.

A. Good morning, sir . . .

[Trial Transcrip V5, pg. 60, lines 1-5.]

Q. . . . . In this case, Mrs. Rainey was the instructor pilot, was she not?

A. Yes, sir.

Q. And Mr. Knowlton was the student?

A. Yes, sir . . . .

[Trial Transcript V5, pg. 60, lines 20-24.]

Q. So Mrs. Rainey would have had to have signed out for the aircraft?

A. Yes, sir . . . .

[Trial Transcript V5, pg. 61, lines 16-18]

Q. If she doesn't already know the young man in this case from prior experience or limited experience, it's her obligation to get to know him, emotionally, and get some grasp of his basic knowledge before she takes him up; isn't that so?

A. It's so, within the limits that are available. Ordinarily, you would talk to them prior, possibly look over his training record, if it was available . . . .

[Trial Transcript V5, pg. 62, lines 1-4.]

Q. Now they go out and get up in the airplane and they're on a flight. Isn't her obligation to overlook everything he does and monitor everything he does, or he does it, when he's in control?

A. Yes, sir . . . .

[Trial Transcript V5, pg. 62, lines 14-18.]

Q. Incidentally—Mrs. Rainey coincidentally started her flight training at the same time you did?

A. Yes, sir, we were in the same beginning class . . . .

[Trial Transcript V5, pg. 63, lines 22-24.]

Q. You completed your flight training, both of you, in May of 1974?

A. No, sir. My wife got her wings on the 22nd of February in 1974; I got mine somewhere around the 15th or 16th of May, 1974.

Q. She finished a little ahead of you?

A. Yes, sir . . . .

[Trial Transcript V5, pg. 64, lines 5-11.]

Q. Now, with American Airlines, you were in the initial stages of crew training and you were there for a flight engineer, were you not?

A. Yes, sir.

Q. At all times with American Airlines, you were a flight engineer?

A. That's correct.

Q. And you now have a commitment to go back to American Airlines as a flight engineer?

A. I have an option to go back as a flight engineer, yes, sir . . . .

[Trial Transcript V5, pg. 66, lines 13-23.]

Q. When you got laid off by American Airlines, you requested the Navy to come back on active duty in the Reserves?

A. Yes, sir.

Q. That's how you got back on active duty in 1981?

A. That's correct . . . .

[Trial Transcript V5, pg. 67, line 49.]

Q. Now, Mrs. Rainey came back into the Navy as a Reserve Officer on active duty at what time?

A. The same time I did.

Q. So you both came back upon request for active duty in 1981?

A. Yes, sir.

Q. Both came back as instructor pilots?

A. Yes, sir.

[Trial Transcript V5, pg. 67, lines 15-22.]

Q. And under Training Wing Five, there were three training squadrons; is that right?

A. There are five training squadrons. There were three fixed wings and two helicopter . . . .

[Trial Transcript V5, pg. 68, lines 10, 14.]

Q. And at all times we're talking about here, she was in Squadron Three; is that right?

A. That's correct.

Q. You were assigned to Squadron Two?

A. Correct . . . .

[Trial Transcript V5, pg. 68, lines 21-25.]

Q. Mrs. Rainey, in Squadron Three, has as her skipper Lieutenant Colonel Habermacher of the Marine Corps.?

A. In the latter half of the time she was in the squadron. Initially, she had Commander John Healy and he was relieved in May of 1982.

Q. At the time of the accident, her skipper was Lieutenant Colonel Habermacher of the Marine Corps?

A. That's correct . . . .

[Trial Transcript V5, pg. 69, lines 4-11.]

Q. Lieutenant Colonel Habermacher was one of them in the pattern?

A. I was told that. I was not there.

THE COURT: You are going into matter that he doesn't know directly himself. I don't know why you're going into it this way.

MR. TOOTHMAN: He has stated in his letter—

THE COURT: Yes, but it comes from something he was told.

MR. TOOTHMAN: Well, it's an admission. I'll tie it up.

THE COURT: Go ahead, sir . . . .

[Trial Transcript V5, pp. 69, 70, lines 23-9.]

Q. After the accident, at some period either in late 1982 or early 1983, in your squadron, Lieutenant Kolakowski came under you direct command, did he not?

A. Command? He worked for me. I don't know if I'd call it command . . . .

[Trial Transcript V5, pg. 71, lines 24-3.]

Q. In February or March of 1983, as one of your duties in the supervision of Lieutenant Kolakowski, you filled out his fitness report, did you not?

A. I filled out a rough fitness report that I submitted to the operations officer, who then sent it to the commanding officer. The commanding officer is the one who does fitness reports on all officers . . . .

[Trial Transcript V5, pg. 71, lines 19, 25.]

Q. Insofar as Lieutenant Kolakowski, you were the one designated to submit the fitness report on Lieutenant Kolakowski?

A. I submitted the initial draft, yes, sir . . . .

[Trial Transcript V5, pg. 72, lines 8, 11.]

Q. Incidentally, you gave Lieutenant Kolakowski a good fitness report, didn't you?

A. Yes, sir. He was a good officer . . . .

[Trial Transcript V5, pp. 72, 73 lines 25, 2.]

THE COURT: Well, show it to him and see if that was the one he saw.

(Document handed to witness.)

THE WITNESS: That is the statement that I saw.

MR. TOOTHMAN: Tell the jury the date on the statement.

THE WITNESS: September 24, 1982.

THE COURT: Is this the statement that you saw, sir?

THE WITNESS: Yes, sir.

THE COURT: All right. Go ahead.

BY MR. TOOTHMAN:

Q. All right, sir. So that after the Shields' flight, this statement was made; isn't that true, sir?

A. That's correct, yes, sir.

Q. And you were present when this statement was made, weren't you?

A. He wrote that statement in my presence, yes, sir.

Q. And you found it so important that you helped him carry it over and give it to Commander Morgan, didn't you?

A. That is correct.

Q. And this is the statement that talks about closing distances, isn't it?

A. Again, that's the only statement I have seen. Yes, that does talk about the closing distances.

Q. And in between those times, you have talked to—in between the time of the accident and the time of this statement on September 24th, you have talked to Captain Guthrie several times, had you not?

A. That is correct.

Q. All right, sir. Next subject. This had to do with a letter you wrote. It is undated and I would like to establish a date with you.

You wrote a letter to Lieutenant Commander Morgan who was—do you know who Lieutenant Commander Morgan is?

A. Yes, sir.

Q. His squadron is what squadron?

A. VT-3.

Q. That is your squadron?

A. No, sir.

Q. You wrote a letter to him what was undated, wherein you recited what you believed to be certain *facts* about the *accident; isn't that so?* (emphasis suplied)

A. I believe it's more correct to say I cited things that I had been told about the accident. I was not there, so I don't know facts about it.

Q. You adopted them as your statements, didn't you?

A. I wrote that letter, yes, sir.

Q. I want to get the date of that letter. Do you remember the date of that letter?

A. No, sir, I do not.

Q. Do you remember that you attached to your letter a statement from Ensign Arnett?

A. To one of my letters, yes, sir, I did.

Q. All right, sir. I'll show you the letter.

(Handing document to witness.)

Q. This is your letter. You enclosed a statement of Ensign Arnett?

A. Yes, sir . . . .

[Trial Transcript V5, pp. 76, 77, 78.]

Q. All right, sir. So then for the purposes of my questions, can we agree that this letter was written the end of 1982 or early 1983?

A. Yes, sir . . . .

[Trial Transcript V5, pp. 78, 79 lines 24-2.]

Q. Now, by this time, by the time you've written this letter, you have talked to Lieutenant Kolakowski, Lieutenant Colonel Habermacher, Ensign Arnett, and Captain Guthrie several times, Hanzell, who was a friend of yours, and Colley? You discussed this case with all of them, hadn't you?

A. I had not discussed the case with Ensign Arnett . . . .

[Trial Transcript V5, pg. 79, lines 6-12.]

Q. All right, sir. Please refer to the letter.

A. Yes, sir.

Q. Paragraph two, did you not state that Lieutenant Commander Rainey attempted to cancel the flight at approximately 0840?

A. That is what I was told.

Q. That's what you said?

A. That's what I wrote, yes, sir.

Q. Now, at the time of 0840 when she attempted to cancel the flight, her request was denied, was it not?

A. Personally, I do not know that. That's what I was told.

Q. Yes, sir. All these things, you weren't there?

A. That's right.

Q. But you talked to all these people and you put these down as facts, didn't you?

A. No, sir, I did not put them down as facts.

Q. You didn't qualify them in any way, did you?

A. I stated in the last paragraph that I submit the above for consideration, in order to present aspects that may not have been covered. I don't know that I presented them as being factual.

THE COURT: Didn't you submit it because you believed them to be true?

THE WITNESS: I had been told them, sir.

THE COURT: Let me ask you this question. Unless you believed them to be true, would you have submitted them?

THE WITNESS: No, sir, I would not.

THE COURT: Then would it be fair to say that you submitted this because while you had been told these things, you believed them to be true?

THE WITNESS: Yes sir.

THE COURT: Go ahead, Mr. Toothman.

Q. When this request to cancel the flight at 0840 was denied to Mrs. Rainey, she reacted in an uncharacteristically heated and disgusted manner, didn't she?

A. Did I say heated?

Q. That's the way—my thing is a little blurred. It's the top of page two of your letter, first line.

A. I can't read that.

Q. All right, sir. You can read the uncharacteristically something and disgusted manner, can't you?

A. Yes, sir.

Q. Now, isn't it true, sir, that you put forth the reasons she tried to cancel this flight was that Ensign Knowlton had been up since 4:30 that morning, as one of the reasons?

A. Yes, sir.

Q. And that they had had one airplane cancel and that they had to wait for this second airplane, and that Ensign Knowlton had an examination at 12:00 that he had to get back for and they were pushed for time?

A. Yes, sir.

Q. That Ensign Knowlton was tired and emotionally drained?

A. I think he said he could possibly have been, yes, sir.

Q. The first line of paragraph C, page two, that they had been exerted to unnecessary pressure, the two of them?

A. I don't know that I said the two of them.

Q. Well, someone was put under unnecessary pressure?

A. Yes, sir, that's what I said.

Q. Go to page four of your letter, paragraph E, second half of paragraph. Now, in this paragraph, you referred to two airplanes, 955— can we agree that that's Mrs. Rainey's airplane?

A. Yes, sir.

Q. And you referred to airplane number 644. Can we agree that that's Lieutenant Colonel Habermacher's airplane?

A. Yes, sir.

Q. Didn't you say, sir, that after Mrs. Rainey's airplane rolled wings level, that Lieutenant Colonel Habermacher's plan came into view unexpectedly at its closest point of approach, although sufficient separation still existed between the aircraft. However, the unexpected proximity of Colonel Habermacher's plane caused one of the aircrew in Mrs. Rainey's plane to react instinctively and abruptly by initiating a hard right turn away from Colonel Habermacher's airplane?

A. That's what I said, based on the information I had at that time, yes, sir.

Q. And this is late December, 1982, early January, 1983, we agreed.

A. Yes, sir.

Q. Now, later on, you and Mrs.—you and Mrs. Knowlton both wrote a letter adopting that same point of view, didn't you?

A. It's not fair to say that Mrs. Knowlton wrote the letter. I wrote the letter and submitted it to her for her approval.

Q. And she signed it?

A. Yes, sir.

MR. TOOTHMAN: Thank you . . . .

[Trial Transcript V5, pp. 77-83.]

CROSS-EXAMINATION

BY MR. LARRY:

Q. John, the inference that Mr. Toothman tried to draw from you was that you influenced the testimony of Captain Guthrie and Ensign Arnett and Lieutenant Kolakowski. Did you do that with any one of these witnesses?

A. No, sir. I—

MR. TOOTHMAN: I object to any of his motivations for these witnesses.

THE COURT: You went into his knowledge of them and so forth. I assumed you were trying to establish some basis for possible bias. The

objection is overruled. You opened that door a little bit.

BY MR. LARRY:

Q. Did you answer the question, John?

A. No, sir, I did not make any attempt to influence their statements.

Q. Has Captain Guthrie ever given any statement that you know of that was in any wise inconsistent with the taped deposition that was presented here in this courtroom?

A. Not that I know of, no, sir.

Q. Now, sir, in your letter to Commander Morgan, when you stated that there was an assumption about a hard right turn, was there some reason why you and Commander Sheilds flew that maneuver three weeks after the crash.

A. Yes, sir. That was based on the information that we had directly after the accident.

Q. And what was your experience? Was it the same as Commander Shield related to this jury, that the aircraft would not stall with power on; was that your experience?

A. Yes, sir. In all of the evolutions that we tested, regimes that we tried, the airplane would not stall with full power available.

Q. One last point. In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably primary cause of this mishap was rollback?

MR. TOOTHMAN: I would object to this, Your Honor. Probable cause is an opinion.

THE COURT: I beg your pardon?

MR. TOOTHMAN: He's trying to get an opinion out of him now, not a fact.

THE COURT: Objection sustained.

MR. LARRY: Your Honor, he has had the ability

— —

MR. TOOTHMAN: I object to him arguing.

MR. LARRY: May I be heard on this?

THE COURT: Yes, sir. Go ahead.

MR. LARRY: On the basis that this letter constitutes an admission by Commander Rainey, he has been asked to answer every single

question Mr. Toothman had respecting—

THE COURT: I don't recall going into anything except the matter about that turn and so forth, and that's all he went into. He did express that opinion and that came in as an admission against him, I suppose, but that doesn't mean you can qualify him for the questions you are now asking. The objection is sustained.

MR. LARRY: No further questions.

[Trial Transcript V5, pp. 83-86.]

2-119-525

87-981

No. [redacted]

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1987

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Aircraft of Canada, Ltd.,

Petitioners,

v.

John C. RAINEY, Individually and as Personal Representative of the Estate of Barbara A. Rainey,

Respondent.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Aircraft of Canada, Ltd.,

Petitioners,

v.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED FOR REVIEW

1. Whether This Court Should Grant Certiorari to Review the Eleventh Circuit's Ruling That Federal Rule of Evidence 803(8)(C) Does Not Permit The Admission, As "Factual Findings", of Opinions As To Ultimate Causation.

PARTIES TO PROCEEDING

1. John C. Rainey
2. Rondi M. Knowlton
3. Beech Aircraft Corporation
4. Beech Aerospace Services, Inc.
5. Pratt & Whitney Canada, Inc.
6. Raytheon Company is the parent corporation of Beech Aircraft Corporation and Beech Aircraft is the parent corporation of Beech Aerospace Services, Inc.
7. United Technologies Corporation is the parent corporation of Pratt & Whitney, Canada, Inc.
8. Underwriters at Lloyds of London and certain British companies; La Reunion Aeroienne; Aviation Office of America; and Skandia Insurance Company, Ltd., are the insurers of Beech Aircraft Corporation and Beech Aerospace Services, Inc.

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No. 87-259

In The

Supreme Court of the United States

October Term, 1987

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Aircraft of Canada, Ltd.,

Petitioners,

v.

John C. RAINEY, Individually and as Personal Representative of the Estate of Barbara A. Rainey,

Respondent.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Aircraft of Canada, Ltd.,

Petitioners,

v.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 827 F.2d 1498 (11th Cir. 1987).

The order granting the rehearing *en banc* is reported at 791 F.2d 833 (11th Cir. 1986).

The original opinion of the Court of Appeals is reported at 784 F.2d 1523 (11th Cir. 1986).

The final judgments for defendants on jury verdicts in the United States District Court for the Northern District of Florida (Pensacola Div.) were not reported.

—o—

JURISDICTION

The *en banc* judgment of the Eleventh Circuit Court of Appeals was entered on September 22, 1987 and reinstated the panel opinion entered on March 25, 1986. Petitioners seek to invoke jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

—o—

FEDERAL RULES OF EVIDENCE INVOLVED

1. Federal Rule of Evidence 803(8)(C). *Hearsay Exceptions; Availability of Declarant Immaterial,* provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (8) *Public records and reports.* Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth . . .
>
> (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

2. Federal Evidence Rule 106. *Remainder of or Related Writings or Recorded Statements,* provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

3. Federal Rule of Evidence Rule 801. *Definitions,* provides as follows:

> The following definitions apply under this article:
>
> (d) *Statements which are not hearsay.* A statement is not hearsay if—
>
> (1) *Prior statement by witness.*—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is. . .
>
> (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . .

—o—

STATEMENT OF THE CASE

The factual and procedural background of this case is accurately and objectively outlined in the *en banc* opinion of the Eleventh Circuit Court of Appeals reported at 827 F.2d 1498 (11th Cir. 1987).

—o—

ARGUMENT

The petitioners have urged this Court to grant certiorari in three separately filed petitions. Since their arguments are essentially the same, respondents hereby offer their response to the petitions in this single brief.

I. This Court Should Deny the Petitions for Writ of Certiorari Because:

A. Historically It Has Not Been the Role of the Supreme Court to Settle Differences Within the Circuits as to the Proper Interpretation of the Federal Rules of Evidence in Civil Cases.

In the thirteen years since the Federal Rules of Evidence were adopted, this Court has generally refrained from taking certiorari to resolve evidentiary conflicts within the circuits. The only exceptions have been a few criminal cases, most of which involved issues pertaining to a criminal defendant's constitutional rights.[1] In fact, respondents have been unable to identify any civil case where the Court took certiorari jurisdiction to resolve a Federal Rule of Evidence conflict.

1. Respondents were able to identify nine criminal cases where the court considered issues pertaining to the Federal Rules of Evidence. *See Bourjaily v. United States*, — U.S. —, 107 S. Ct. 2775 (1987); *Tanner v. United States*, — U.S. —, 107 S. Ct. 2739 (1987); *United States v. Inadi*, — U.S. —, 106 S. Ct. 1121 (1986); *United States v. Abel*, 469 U.S. 45 (1984); *Luce v. United States*, 469 U.S. 38 (1984); *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Upjohn Company v. United States*, 449 U.S. 383 (1981); *United States v. Nobles*, 422 U.S. 225 (1975); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Only *Upjohn*, *Luce* and *Abel* did not expressly involve the interplay of the evidence rules and a defendant's constitutional rights. *Upjohn* and *Abel* actually only peripherally involved Rule 501 which provides that issues pertaining to the privilege of witnesses "shall be governed by the principles of the common law . . ."

This Court has, in several instances, even denied conflict certiorari in criminal cases where a clear, direct conflict existed within the circuits. In *Means v. United States*, 469 U.S. 1058 (1984), this Court denied a certiorari petition to consider Rule 801(d)(2)(E) (co-conspirators statement exception to the hearsay rule), even though the Sixth Circuit was "inconsistent with the stated position of every other Federal Court of Appeals." *Id.* (White J., dissenting).[2] In *Diggs v. Lyons*, 471 U.S. 1078 (1985), (White J., dissenting) the Court denied certiorari to resolve a conflict as to Rule 609(a) (admissibility of prior felony convictions), even though the Third Circuit's interpretation of Rule 609(a) directly conflicted with interpretation given the rule by the Eighth and Fifth Circuits. In *McKethan v. United States* and *Garner v. United States*, 439 U.S. 936 (1978) (consolidated), the Court denied certiorari to consider whether grand jury testimony was admissible under Rule 804(b)(5), the "catch-all" exception to the hearsay rule. Justice Stewart's dissent indicates that the Fourth Circuit advocated a broad view of that admissibility question, and the Fifth and Second Circuits supplied a much narrower view. *Id.* at 937. (Stewart, J., dissenting).

When this Court's Advisory Committee formulated Rule 803(8)(C) and sent it to Congress for consideration,

2. The Court eventually granted certiorari in another case concerning the same issue, *Bourjaily v. United States*, — U.S. —, 107 S. Ct. 2775 (1987).

it was aware that the federal district and circuit courts might interpret and apply the "factual findings" language of Rule 803(8)(C) in different ways. In the notes accompanying their draft of the Rules of Evidence, the Advisory Committee commented that the admissibility of evaluative reports was one of "[t]he more controversial area[s] of public records." Fed. R. Evid. 803 Advisory Committee note. The committee noted that there was diversity in the decisions pertaining to evaluative reports, due, in part, to the "variety of situations encountered, as well as to differences in principle." The Advisory Committee further noted that "[t]he formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility." *Id.*

The House and Senate Judiciary Committees disagreed, respectively, on whether "factual findings" should be narrowly construed to exclude opinions, or broadly construed to include them.[3] Nevertheless, that specific portion of the rule was adopted as proposed by the Supreme Court Advisory Committee, rather than specifically amending the language to make it clear that "factual findings" should be broadly defined to include "opinions".[4] Since that time, this Court and Congress have left interpretation of the rule to the district and circuit courts.

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3. *See* H.R. No. 93-650 to accompany H.R. 5463, P.L. 93-595, p. 14 ("factual findings" to be strictly construed and evalutions and opinions shall not be admissible.) and S.R. No. 93-1227 to accompany H.R. 5463, P.L. 93-595, p. 18 (evalulative reports should be admissible unless trustworthiness is lacking.)

4. Congress made only minor changes to the Supreme Court's Rule 803(8)(C) by adding "and proceedings" after "in civil cases".

The Supreme Court should here continue that judicial restraint, recognizing that not every difference within the circuits as to the construction of the Rules of Evidence necessarily need be resolved by this Court.

B. The "Conflict" Concerning Rule 803(8)(C) is Not Sufficiently Direct to Justify the Court Taking Certiorari Jurisdiction.

In its petition, Beech Aircraft Corporation (hereinafter "Beech") argues the Court should take certiorari because "the Circuit Courts of this country are sharply divided on the issue of whether evaluative conclusions contained in trustworthy investigative reports are admissible pursuant to Rule 803(8)(C)." Beech Petition for Writ of Certiorari, p. 11. Respondents respectfully submit that this argument does not withstand scrutiny sufficient to justify the grant of certiorari which the petitioners seek.

While the Eleventh Circuit itself has recognized a "difference of opinion" within the circuits as to the meaning of the "factual findings" language of Rule 803(8)(C), *Rainey v. Beech Aircraft Corporation*, 784 F.2d 1523, 1527 (11th Cir. 1986), the difference of opinion does not rise to the level of a "direct conflict" sufficient to justify this Court's grant of certiorari.[5]

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5. In a report entitled *Conflicts Involving Federal Law: A Review of Cases Presented to the Supreme Court,* which was contained with the report for proposed revisions of the appellate system prepared by the Commission on Revision of the Federal Court Appellate System published in 67 F.R.D. at 195, 305, the author, Professor Floyd Feeney, classified the inter-circuit conflicts presented to the Supreme Court as follows:

(Continued on following page)

The Eleventh Circuit below was called upon to decide whether Rule 803(8)(C) should have permitted the admission, as a "factual finding", of the written opinion of one investigator—an opinion which required the application of principles of aerodynamics, turbine engine design and operation, pneumatic fuel control function and design, variable pitch propeller operation, and sophisticated crash investigation skills. (It should be noted that none of the parties called an expert to testify who, by himself, possessed all of these required skills.) Moreover, it was a written opinion which was admitted enabling petitioners to avoid subjecting the author to cross-examination.

The Naval JAG investigator's clearly labeled "opinion" that pilot error was "[t]he most probable cause of the accident", *Rainey v. Beech Aircraft Corporation,* 827 F.2d 1498, 1505 (11th Cir. 1987) (*en banc*), was clearly

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(Continued from previous page)

(1) Direct Conflict—A case in which the decision below deals with the same explicit point as some other case and reaches a contradictory result.

(2) Strong partial conflict—A case in which the decision below is in the same general area of the law as some other case and where the implications of the doctrine followed in one case would compel an opposite result in the other. These cases are not considered as conflicting directly because the points involved are not exactly the same.

(3) Weak partial conflict—A case in which there is some degree of legitimacy to the claim of conflict but where the conflict is more attenuated than in the strong partial category.

(4) No genuine conflict—A case in which a conflict is claimed but in which examination indicates no genuine inconsistency in outcome or doctrine.

not a "normative opinion" or "evaluative conclusion" such as those involved in many of the cases cited by petitioners. Rather, it was an opinion as to the principal, hotly contested liability issue as to which the parties' highly qualified experts differed. None of the circuit court cases cited by petitioners involved the admission of such an opinion as a "factual finding". The Eleventh Circuit's decision excluding the JAG investigator's opinion as to the cause of an accident is not in direct conflict with any circuit because no other circuit court has considered the admissibility of an opinion such as the one contained in the JAG report.

Those circuits which have admitted evaluations and opinions under the "factual findings" language of Rule 803(8)(C), have dealt with conclusions of quite a different character than the Naval JAG opinion of the instant case. In *United States v. Smith,* 521 F.2d 957 (D.C. Cir. 1975), the District of Columbia Circuit held that a police report containing "factual conclusions" was admissible under the Business Records Act, 28 U.S.C. § 1732(a), the predecessor of Rule 803(6). In dicta, the court expressed the opinion that the records would also be admissible under Rule 803(8)(C), 521 F.2d at 968, n.24. The factual conclusions included within the report appear to have been paraphrasals and descriptions gathered firsthand from witnesses and did not include any opinions as to ultimate guilt or liability. *Id.* at 960. The First Circuit, in *Robbins v. Whelan,* 653 F.2d 47 (1st Cir. 1981), *cert. denied,* 454 U.S. 1123 (1981), allowed the introduction of purely normative factual data compilations concerning automobile maximum stopping distances. *Whelan's* distinction from the case at bar is apparent; the normative conclusions there were ones as to which most similarly skilled

persons would agree. The Third Circuit, in *Melville v. American Home Assurance Co.*, 584 F.2d 1306 (3d Cir. 1978), permitted the admission of reports which contained some conclusory material, but which did not contain an opinion as to the cause of the airplane crash involved in the litigation. *Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984), decided by the Fourth Circuit, permitted admission of a summary of correlative data reports prepared by the Center for Disease Control, but did not involve the admission into evidence of any written opinion as to the probable cause of injuries. The Sixth Circuit, in *Wilson v. Beebe*, 743 F.2d 342 (6th Cir. 1984), admitted a report which contained simple evaluative conclusions as to which most similarly skilled or trained persons would agree, and which were based on apparently clear and undisputed facts. Also, in *In the matter of the Complaint of Paducah Towing Company, Inc. v. United States*, 692 F.2d 412 (6th Cir. 1982), the Sixth Circuit admitted the findings of an administrative law judge made after a quasi-judicial hearing. It is unclear whether the "findings" were opinions as to ultimate cause. And in *Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), the officer whose report had been entered into evidence was available at the trial for cross-examination. In *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986), and *Plummer v. Western International Hotels Co., Inc.*, 656 F.2d 502 (9th Cir. 1981), there are no indications as to the specific wording of the conclusions that were contained in the disputed Equal Employment Opportunity Commission reports, but it is unlikely that one person's "expert opinions" as to the ultimate issues were rendered in the reports. The Eighth Circuit in *Kehm v. Proctor and Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir.

1983), like *Ellis*, admitted Center for Disease Control studies based upon normative data which contained no written opinion as to the probable cause of the plaintiff's injuries. The Tenth Circuit case of *Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986) involved the admission of a report compiled by a public agency review board after a hearing into a police shooting. There were no review board type hearings held in the instant case.

While a difference in principle may exist within the circuits as to whether 803(8)(C) should be read literally or liberally, the variety of factual settings and diversity as to the nature of the opinions admitted in the various circuits indicate that the conflict in the instant case is not sufficiently direct to justify a grant of certiorari.

Petitioners have pointed to intra-circuit conflicts between decisions in the Second and Fifth Circuits. Intra-circuit conflict is not, under Supreme Court Rule 17, a basis for granting a writ of certiorari. Moreover, the most recent decisions of the Second and Fifth Circuits involving Rule 803(8)(C) have upheld the exclusion of certain opinions expressed in investigative reports. *See Stissi v. Interstate and Ocean Transport Co.*, 765 F.2d 370 (2d Cir. 1985) (upholding district court's editing out conclusory portions of a Coast Guard report); *McQuaig v. McCoy*, 806 F.2d 1298 (5th Cir. 1987) (upholding district court's exclusion of police department internal affairs report containing investigator's opinions that investigated officer's actions were "capricious and prejudicial").

Finally, Petitioners' argument that the Eleventh Circuit is in conflict with the Supreme Court's decision in

Chandler v. Roudebush, 425 U.S. 840 (1976) is weak at best. *Roudebush* involved several issues pertaining to the judicial reviewability of federal employee discrimination claims after administrative remedies have been exhausted. The court stated in footnoted dicta that prior administrative findings concerning the employment discrimination claim were admissible in a federal distrct court's *de novo* revew of the matter. 425 U.S. at 863, n.39. That dicta made only a general reference to Federal Rule 803(8)(C) "findings" with no discussion, explanation or description of the types of findings which would be admissible.[6] *Roudebush* can hardly be said to establish Supreme Court authority controlling the admission of probable cause opinions from a Naval Judge Advocate General officer's one man investigation of an accident.

C. The Eleventh Circuit's Narrow Construction of Rule 803(8)(C) is the Correct View. Accordingly, the Supreme Court Should Not Grant Certiorari if the End Result is to Affirm the Eleventh Circuit.

The Eleventh Circuit's rejection of the broad admissibility approach to the "factual finding" language of 803(8)(C) was and is correct. Accordingly, this Court should deny certiorari.

The Eleventh Circuit's "narrow" construction approach is correct for several reasons:

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6. While a solitary District Judge has interpreted *Roudebush* as a "broad directive for liberal use of agency findings," *Cohen v. General Motors*, 534 F. Supp. 509 (W.D. Mo. 1982), such a directive would be inapposite for the instant case because *Roudebush* involved a governmental agency's administrative findings produced after a quasi-judicial hearing and other administrative proceedings.

(1) The plain wording of Federal Rule of Evidence 803(8)(C) expressly limits the admissibility of reports to their "factual findings", making no allowance for the admission of opinions and conclusions. Had the Supreme Court and Congress intended opinions and conclusions to be admissible under this rule, they could have written the rule to expressly so provide, as was done with Rule 803(6) which expressly provides for admission of the opinions and diagnoses contained in business records.[7] It was this plain, forthright approach to Rule 803(8)(C) which lead the Fifth Circuit in *Smith v. Ithaca Corp.*, 612 F.2d 215, 221-222 (5th Cir. 1980), to conclude that an opinion contained in a Coast Guard investigation report was not admissible as a "factual finding". *Smith* became binding precedent in the Eleventh Circuit upon that circuit's formation[8] and its ruling, as well as it reasoning, today remain part of the Eleventh Circuit's jurisprudence. It represents the correct construction of Rule 803(8)(C)'s

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7. Federal Rule of Evidence 803(6) provides:

   Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

8. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

"factual finding" language, and its reasoning is commended to this Court for its logical, forthright and fair approach.

(2) Although advocating a liberal reading of Rule 803(8)(C), even the analysis of the rule contained in Weinstein's evidence treatise suggests that there should be some limitation on the extent to which opinions may be regared as findings of fact. The treatise advocates that "[i]f the report states a conclusion that would be helpful—and is reliable—it should be admitted." 4 Weinstein's *Evidence,* 803(8)[03] at 803-251. Weinstein quotes the opinion of a district judge who, after an extensive review of Rule 803(8)(C) cases, stated that it is now generally accepted that "evaluative reports of public agencies (i.e., those rendering *normative* judgments or opinions, not just reciting facts) are admissible". 4 Weinsiten, *supra* at 803-251, (*citing Zenith Radio Corporation v. Matsushita Electric Industries Co.,* 505 F. Supp. 1125 (E.D. Pa. 1980)).

The admission in this case of the official written opinion of the Naval JAG Officer as to the cause of the crash was not "helpful" to the jury in performing their difficult task of sorting the conflicting evidence and opinions and reaching their decision. More "helpful" to the jury might be the admission of "normative conclusions." That was the approach followed in *In Re Air Crash Disaster at Mannheim, Germany,* 586 F. Supp. 711 (E.D. Penn. 1984), *Rev'd on other grounds,* 769 F.2d 115 (3d Cir. 1985), *cert. den.,* 106 S. Ct. 851 (1986) where the court observed "[i]t is now settled that evaluative reports (i.e. *those containing normative conclusions* in addition to a recitation of facts) are admissible." 586 F. Supp. at 725 (emphasis

added). However, the JAG officer's opinion involved here goes beyond being a finding of fact or a normative conclusion. It goes far beyond that which is based upon directly observable facts or well known tests. It was not a conclusion that all persons skilled in the art would likely be able to reach. As such, the opinion was not one that was helpful to the jury but rather was one which became a substitute for the jury's decision and therefore helpful only to the party who offered the opinion.

(3) Moreover, the reading of Rule 803(8)(C) by the Eleventh Circuit is correct because it is fair. Federal Evidence Rule 102 provides that the Rules of Evidence "shall be construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined." Neither fairness nor the ascertainment of truth were promoted by allowing a jury evaluating complicated causation testimony, which included vigorous and wide disagreement among various experts, to be shown an official Naval Judge Advocate General's opinion as to the ultimate issue to be decided by them. None of the circuit court cases cited by petitioners as following the broader application of the rule expressly condone the admission, as in the trial below, of the written opinion of one man not available for cross-examination regarding the ultimate issue of causation to be decided by the jury. The conclusion of the JAG officer who authored the report in the case at bar contained far more than factual findings and normative conclusions and was correctly deemed inadmissible by the Eleventh Circuit's holding.

D. Whether the Eleventh Circuit Correctly Applied Rules 106 and 801 is Not An Issue This Court Should Address, As No Conflict is Involved And the Application of the Rules to the Facts Was Unanimously Supported By the Eleventh Circuit Judges.

While petitioners urge that the Eleventh Circiut erred in its application of Rules 106 and 801, none of the petitioner's have asserted that the Eleventh Circuit's decision applying Rules 106 and 801 presents independent grounds for granting certiorari. That ruling is not and cannot be a basis for granting certiorari, and should not be reconsidered by this Court. The Eleventh Circuit, as a panel, 784 F.2d at 1523 and in its *en banc* consideration of this case, 827 F.2d at 1498, was unanimous in ruling that Rainey's testimony regarding the remaining portions of his letter was improperly excluded by the trial judge and should have been admitted under both Rule 106 and Rule 801. The Eleventh Circuit judges were unanimous in their directive that a new trial was required on that ground alone.

———o———

CONCLUSION

The circuits have interpreted Rule 803(8)(C) in a variety of ways. Depending largely upon the nature of the opinion deemed to be "factual findings", the circuits differed in what should or should not be admissible. The Advisory Committee for this Court recognized that the federal courts differed as to whether "evaluative reports" would be admissible but did not attempt to make the express wording of the rule any more specific. Historically,

conflicts in the circuits as to the proper construction of Rules of Evidence have not been resolved by conflict certiorari. This has particularly been true in civil cases. The difference of opinion as to the construction of the "factual findings" language of 803(8)(C) is not a sufficiently "direct conflict" to justify the Court's granting certiorari. Moreover, the existing Eleventh Circuit precedent is correct. Accordingly, this court should deny the petitions for writ of certiorari.

Respectfully submitted,

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No. 87-981

In The

Supreme Court of the United States

October Term, 1987

BEECH AIRCRAFT CORPORATION, BEECH AEROSPACE SERVICES, INC., and PRATT & WHITNEY CANADA, INC.,
Petitioners,

vs.

JOHN C. RAINEY,
Respondent,

BEECH AIRCRAFT CORPORATION, BEECH AEROSPACE SERVICES, INC., and PRATT & WHITNEY CANADA, INC.,
Petitioners,

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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ARGUMENT

Petitioners, Beech Aircraft Corporation and Beech Aerospace Services, Inc. file the following joint Reply to Respondents' Brief in Opposition.

I.

THE RESPONDENTS URGE THE COURT TO ADOPT A POSITION WHICH WOULD DISCOURAGE UNIFORM APPLICATION OF THE FEDERAL RULES OF EVIDENCE.

Respondents urge the Court to decline jurisdiction because disparate application of the Federal Rules of Evidence is an acceptable, even anticipated, occurrence. (Respondent's Brief pp. 6-7) Respondents hypothesize that since relatively few evidentiary cases have reached this Court that it is acceptable for the Circuits to apply the Rules of Evidence in a contradictory fashion. Petitioners disagree and assert that such an analysis would undermine the very uniformity which is essential to a consistent and just application of the Federal Rules of Evidence. It is respectfully submitted that the relatively few United States Supreme Court cases addressing evidentiary questions is attributable to the long, and deliberate drafting process of the Federal Rules of Evidence, rather than any reluctance on the part of this Court to act as final arbiter over the Rules which it promulgated.[1] Additionally, this Court

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[1] The drafting of the Federal Rules of Evidence began in 1961 and concluded when the Rules became effective July 1, 1975. See 21 C. Wright & K. Graham, *Federal Practice & Procedure* § 5006 (1987). Note: a listing of all corporate affiliates has been included in the Petitioner's certiorari petitions.

has had few occasions to decide such issues. See *Michelson v. United States,* 335 U.S. 469 (1948). However, it is incorrect to extrapolate from this lack of authority that this Court condones the conflicting application of the Federal Rules of Evidence by the Circuit Courts of this country.

Although Respondents urge that it is permissible for the Rules of Evidence to be applied in a contradictory manner, it is this lack of uniformity which provided the original impetus for the development of a uniform body of Federal Evidence. In their treatise on Federal Evidence, Professors Wright and Graham pointedly discuss the confusion which reigned among the Circuits prior to the adoption of the Federal Evidence Rules:

> During this period the system of federal intermediate appellate Courts assumed its present shape and its modern responsibility for the development of evidence law. The Supreme Court's gradual relinquishment of control to the Courts of Appeals marked the end of consistency and uniformity. The publication on a nationwide basis of the rulings of the lower federal courts produced a proliferation of precedents beyond the competence of judge or lawyer to master. This made it difficult to maintain consistency even within a single circuit. . . . This era is largely responsible for the poor repute of the federal law of evidence.

21 C. Wright & K. Graham, Federal Practice & Procedure § 5002 (1987). Out of the confusion created by these conflicting precedents came the call for uniformity and predictability in the application of evidentiary principles. Proponents of the Federal Rules of Evidence urged that by adopting a uniform system, consistency and fairness could be offered to litigants throughout the country. This

point is illustrated by the following colloquy which occurred between Congressman Henry P. Smith, III, and Congressman Edward Hutchinson during debate over the passage of the Federal Rules of Evidence.

Mr. Hutchinson:	. . . Up until this time, the Federal Rules of Evidence have evolved out of court decisions and the rules of evidence have varied from Circuit to Circuit within the country; is that correct?
Mr. Smith of New York:	That is correct.
Mr. Hutchinson:	The purpose of this bill is to provide a uniformity within the Federal Rules of Evidence so that the same rules of evidence will apply uniformly throughout all of the Circuits, is that correct?
Mr. Smith of New York:	Throughout all of the Circuits and all over the United States.

Congressional Record H1309, January 30, 1974. As is apparent, the very purpose of codifying the uniform rules of evidence was to remove this area of the law from the realm of uncertainty which had been created by conflicting Circuit Court decisions. Notwithstanding the cardinal purpose of the Rules of Evidence, the respondents inexplicably urge this Court to adopt a hands off approach which would allow the Circuit Courts to adopt widely divergent interpretations of Federal Rule of Evidence 803(8)(C). Respondents believe such a suggestion to be wholly inconsistent with the purpose of the rules.

II.

THE CIRCUIT COURTS OF APPEAL ARE IN DIRECT CONFLICT AS TO WHETHER EVALUATIVE CONCLUSIONS IN INVESTIGATIVE REPORTS PREPARED PURSUANT TO LAW ARE ADMISSIBLE PURSUANT TO FED. R. EVID. 803(8)(C)

Respondents argue that the Circuit Courts simply have a "difference of opinion" over the appropriate interpretation of Federal Rule of Evidence 803(8)(C). (Respondent's Brief page 7.) They also contend that this difference of opinion is insufficient to invoke this Court's discretionary jurisdiction. We disagree because a review of the pertinent cases demonstrates that the Fifth and Eleventh Circuits' construction of Fed. R. Evid. 803(8)(C) is diametrically opposed to the interpretation of this rule adopted by every other Circuit. *Compare Perrin v. Anderson,* 784 F.2d 1040, 1046 (10th Cir. 1986) (admitting report of shooting review board concluding that an officer acted within police guidelines), *with McQuaig v. McCoy,* 806 F.2d 1298 (5th Cir. 1987) (excluding conclusions in police internal affairs report regarding conduct of arresting officer). It is this direct conflict which led Judges Tjoflat and Johnson to characterize the Fifth Circuit's interpretation of Rule 803(8)(C) as an "anomaly among the Circuits". See *Rainey v. Beech Aircraft Corporation,* 827 F.2d 1498, 1508 (11th Cir. 1987). Obviously, Judges Tjoflat and Johnson would have refrained from such a harsh characterization if the Circuits were simply divided by an ordinary difference of opinion. The existence of a real conflict regarding Rule 803(8)(C) is best illustrated by the fact that the en banc panel of the 11th Circuit was unable to agree as to how this rule should be interpreted

and applied. Therefore, it was forced to adopt existing Fifth Circuit precedent on this issue, even though half of its judges flatly disagreed with the conclusions reached by that Court. *Rainey v. Beech Aircraft Corporation,* 827 F.2d 1498 (11th Cir. 1987).

The conflict, over how Rule 803(8)(C) should be interpreted, has existed, from the time this rule was first debated, as the Senate and House developed opposite views as to the appropriate scope of this rule. See Report of the Committee on the Judiciary. H.R. Rep. No. 650, 93rd Cong. 1st Session 14 (1973) and Report of the Committee on the Judiciary S. Rep. No. 1277, 93rd Cong. 2d Sess. 18 (1973). Since that date, only the Fifth and Eleventh Circuits have followed the restrictive interpretation urged by the House, while every other Circuit has adopted the view of the Senate and the Advisory Committee in favor of broad admissibility of evaluative conclusions. Thus, regardless of the manner by which one chooses to characterize this split of authority it is clear that a direct conflict has existed since the inception of Fed. R. Evid. 803(8)(C).

Respondents attempt to gloss over this conflict by drawing hair splitting distinctions between normative conclusions and evaluative opinions. Relying upon two district court cases, respondents contend that Rule 803(8)(C) only authorizes the admission of normative findings, but does not authorize admission of evaluative conclusions on causation. (Respondents' Brief pages 14-15) However, such a distinction finds no support in the history of this rule, nor in its application by the Circuit Courts. *See e.g., Lloyd v. American Export Lines, Inc.,* 580 F.2d 1179

(3rd Cir.) *cert denied* 439 U.S. 969 (1978) (admitting conclusions of Coast Guard Hearing Examiner regarding responsibility for an assault); *In Re Paducah Towing Co.*, 692 F.2d 412, 421 (6th Cir. 1982) (admitting Administrative Law Judge's conclusion that Captain acted reasonably in mooring vessel); *Wilson v. Beebe*, 770 F.2d 578, 589 (6th Cir. 1985) (admitting internal police report concluding that officer had acted contrary to department policy in handcuffing suspect with his weapon cocked).[2] The results reached in these cases are supported by the Advisory Committee note to Rule 803(8)(C) which indicates that evaluative conclusions should be admitted as long as they are sufficiently trustworthy. Fed. R. Evid. 803(8)(C) advisory committee note. (The rule, "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present"). As the advisory committee note indicates, the correct view, and the one adopted by the majority of the Circuits, is to focus on the trustworthiness of a report and not on whether it contains the conclusions of the investigative officer. *Kehm v. Proctor & Gamble Manufacturing Company*, 724 F.2d 613, 618 (8th Cir. 1983). To adopt the position urged by Respondents would leave judges with the almost impossible task of separating normative opin-

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[2] Each of these cases clearly involved the admission of evaluative conclusions pursuant to Rule 803(8)(C). Respondents attempt to distinguish these decisions by asserting that the investigatory process employed therein was more thorough than that utilized in the instant case. However, this contention only goes to the issue of trustworthiness, it does not alter, or even address, the fact that several Circuits have admitted evaluative conclusions pursuant to Rule 803(8)(C).

ions from evaluative conclusions. It is respectfully suggested that such an interpretation would be contrary to the express purpose of the Rule and can only serve to deprive the trier of fact of useful weighable information. For their part, the great majority of Circuit Courts have clearly recognized this fact, as they have admitted evaluative conclusions as evidence. The Courts have not added to the confusion surrounding this rule by attempting to draw artificial distinctions between those opinions which are normative and those which are evaluative.

III.

THE ISSUE PRESENTED FOR REVIEW IS WHETHER EVALUATIVE CONCLUSIONS CONTAINED IN THE NAVY'S JAG REPORT ARE ADMISSIBLE PURSUANT TO FED. R. EVID. 803(8)(C)

Respondents' Brief in opposition argues that Fed. R. Evid. 803(8)(C) was misapplied at trial because the disputed conclusion embraced an ultimate issue and was formulated by an investigator who was not qualified to render such an opinion. However, neither of these arguments address the issue which Petitioners present for review, that being whether evaluative conclusions in investigative reports are admissible pursuant to Rule 803(8)(C). Respondents are inadvertently confusing the issue with arguments that have previously been rejected by both the District and Circuit Courts.

Rule 803(8)(C) makes ample provision for the rejection of any report if the circumstances suggest that its findings or conclusions are untrustworthy. See Fed. R. Evid. 803(8)(C), advisory committee note. Thus, the

rule contemplates admissibility in the first instance subject to a rigorous examination of the investigators qualifications, as well as the methodology employed. Notwithstanding these clear directives, the Respondents in this case made no attempt to investigate the qualifications of the investigating JAG Officer nor to discredit his investigatory process. As a result, in the 11th Circuit, both the panel and the en banc Court concluded that the disputed JAG report was a trustworthy document for purposes of Rule 803(8)(C). *Rainey,* 827 at 1516. See also *Rainey v. Beech Aircraft Corp.,* 784 F.2d 1523, 1527 (11th Cir. 1986). Presently, the only issue before this Court is whether evaluative conclusions are admissible pursuant to Rule 803(8)(C). The issue of trustworthiness is a collateral consideration which has already been determined by the lower courts and which has no bearing on the question of whether evaluative conclusions are admissible in the first instant pursuant to Rule 803(8)(C). Respondents' attempt to raise trustworthiness at this stage serves only to detract from the issue presented.

Likewise, Respondents' inadvertently confuse the issue for this Court's consideration by asserting that the admission of the JAG report invaded the province of the jury. This contention is without merit as Fed. R. Evid. 704 has long since put to rest any argument regarding the ultimate issue rule. See Fed R. Evid. 704 (". . . testimony in the form of an opinion or inference otherwise admisible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact"). The contention that such evidence invades the province of the jury is aptly described as "empty rhetoric" in the advisory committee note to this rule. See Fed. R. Evid. 704, ad-

visory committee note. Experts routinely testify and offer opinions on causation, as did several witnesses at the trial of the instant cause. Thus, it completely begs the question at hand to say that the disputed JAG report contains causative conclusions, where the sole issue to be addressed is whether Fed. R. Evid. 803(8)(C) contemplates admission of such conclusions as evidence.

IV.

USE OF RULE 106 TO ADMIT LAY OPINIONS OF A PARTY NOT QUALIFIED AS AN EXPERT CLEARLY DEPARTS FROM ACCEPTABLE JUDICIAL PROCEEDINGS.

The issue involving Rule 106 is not one of conflict. Rather, the use of this rule by the 11th Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17.1(a)

Only portions of Lieutenant Commander Rainey's letter relating to purely factual matters were read into evidence. He was not qualified as an expert in aircraft engines, pneumatic fuel controls or any related field. To allow the 11th Circuit decision to stand, would provide Respondents with a vehicle, under the guise of Fed. R. Evid. 106, to admit lay opinion evidence on the phenomenon of engine rollback and the cause of the accident. Admission of unqualified lay opinion on such technical matters would be a tragic departure from the accepted and usual course of judicial proceedings.

———o———

CONCLUSION

Based on the foregoing, as well as the argument and authorities contained in the Petitions for Certiorari filed by Petitioners, it is respectfully urged that the Writ be granted and that the opinion of the En Banc Eleventh Circuit Court of Appeals be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1987

BEECH AIRCRAFT CORPORATION AND
BEECH AEROSPACE SERVICES, INC.,

vs. *Petitioners,*

JOHN C. RAINEY,

Respondent,

BEECH AIRCRAFT CORPORATION AND
BEECH AEROSPACE SERVICES, INC.,

vs. *Petitioners,*

RONDI M. KNOWLTON,

Respondent.

**On Writ Of Certiorari To The
United States Court of Appeals
For The Eleventh Circuit**

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QUESTIONS PRESENTED

1. Whether opinions and conclusions contained in NAVY JAG Reports should be admissible as "factual findings" under Federal Rule of Evidence 803(8)(C).

2. Whether the Eleventh Circuit En Banc correctly held under Federal Rules of Evidence 106 and 801(d)(1)(B) that the trial judge improperly restricted Rainey's testimony about portions of a letter he wrote while permitting the defendants to examine him about other portions of the same letter.

PARTIES TO PROCEEDINGS BELOW

All parties having an interest in the proceedings below are accurately set forth in Beech Aircraft's Brief.

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OPINIONS BELOW

The briefs of Beech Aircraft Corporation and Beech Aerospace Services, Inc. adequately set forth the Opinions Below.

STATEMENT OF JURISDICTION

The briefs of Beech Aircraft Corporation and Beech Aerospace Services, Inc. adequately set forth the Jurisdiction of this Court.

STATUTORY PROVISIONS AT ISSUE

1. *Federal Rule of Evidence 803. Hearsay Exceptions; Availability of Declarant Immaterial*, provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) Public records and reports. Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

2. *Federal Rule of Evidence 106.* Remainder of or Related Writings or Recorded Statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may

require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

3. *Federal Rule of Evidence 801. DEFINITIONS*, provides as follows:

(d) Statements which are not hearsay. A statement is not hearsay if –

(1) Prior Statement by witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

STATEMENT OF THE CASE

(A) Factual Background.

On July 13, 1982, LCDR Barbara Allen Rainey, a Naval instructor pilot, and her student, Ensign Donald Bruce Knowlton, were issued a Beech T-34C Turbo-Mentor aircraft BUNO 160955 (hereinafter "aircraft 955") for a training exercise that included "touch and go" exercises at Middleton Field, Alabama. While at Middleton their aircraft was one of five in the landing pattern, with one aircraft entering the pattern (Col. Habermacher) and one aircraft departing (Capt. Guthrie). At a time when Col. Habermacher had just entered the landing pattern, and following takeoff after a touch and go, aircraft 955 crashed in close proximity to the airport.

John C. Rainey and Rondi M. Knowlton brought separate product liability actions as personal representatives of the estates of their spouses, pursuant to Florida's Wrongful Death Act, Fla. Stat. §768.16-27. They sued Beech Aircraft Corporation (hereinafter "Beech") as the manufacturer of the T-34C, Pratt & Whitney Canada, Ltd. (hereinafter "Pratt") as the manufacturer of the engine and Beech Aerospace Services, Inc. (hereinafter "BASI") as the company under contract with the Navy to perform aircraft maintenance at Whiting Field.

The plaintiffs alleged that the crash was caused by an in-flight loss of engine power known as a "rollback," caused by a defect in the design of the aircraft's pneumatic fuel control system. Beech, Pratt and BASI denied the allegations of defect, denied a "rollback" caused this crash, and alleged the cause was pilot error in stalling the aircraft in an avoidance maneuver occasioned by the pilots having failed to maintain proper interval in the touch and go landing pattern.

The fuel control system of aircraft 955 burned up in the crash. There were no survivors to testify to what happened. Thus whether aircraft 955 crashed by reason of a rollback/fuel control defect or by reason of pilot error was a matter of expert opinion based upon a large volume of evidence from which inferences supporting either theory could be drawn.

The testimony of virtually all of the eyewitnesses was presented to the jury, as was testimony from various Navy, Civil Service, Beech, Pratt and retained experts who performed post-crash analyses of the aircraft, engine, propeller and scene. Their testimony need not be recounted here. Suffice it to say, however, that the pivotal issue before the jury during two weeks of trial was whether 955 crashed because of rollback or because of pilot error in stalling the aircraft in an avoidance maneuver necessitated by failing to take proper interval on Col. Habermacher. That this was the pivotal issue is well illustrated by the parties' opening statements:

(Plaintiff's Opening)

> "So the experienced pilots will tell you that this aircraft would not have crashed, would not have stalled with power available, but the testimony will be that Barbara Rainey and Bruce Knowlton did not have power. They had a rollback." (Vol. 1 T. at 37)

(Beech's Opening)

> "Now, Mr. Larry has said to you that the airplane had an engine failure and that that was the cause of this tragedy. We think that that's not so, and we think the factual evidence will support our position." (Vol. 1 T. at 47)

> "Sad as it may be, lastly, I suggest to you that the pilots in this airplane simply stalled it." (Vol. 1 T. at 54)

There was testimony from various eyewitnesses, aviators and retained experts called by plaintiffs that aircraft 955 had developed a power problem. There was testimony from various Beech, Pratt and BASI witnesses and retained experts that aircraft 955 crashed

due to pilot error in stalling the aircraft in an avoidance maneuver necessitated by the failure to maintain proper interval. A complicated jury issue was presented as to the cause of 955's crash.

(B) The JAG Report.

In this context, the admissibility of the Judge Advocate General Investigator's opinion that pilot error was the most probable cause of the crash was of tremendous concern to the plaintiffs and defendants. Opinion 7 of the report stated: "The most probable cause of the accident was the pilot's failure to maintain proper interval." It would damage the plaintiffs' case and bolster the defendants' case. Offered only in writing, it would be the only official Navy opinion expressed at the trial and it would go to the central issue. It would be the only opinion expressed at the trial by any witness whose testimony, opinion, basis in fact, and qualifications were not subject to cross-examination.

The admissibility of the JAG Report's opinions was briefed and argued at the pretrial conference held on March 20, 1984. At that time, in a ruling later included in a written pre-trial order, the trial judge held that the JAG Report, while trustworthy, would be admitted at trial only as to its "factual findings," "and would not be admissible insofar as any opinions or conclusions are concerned." The court went on to say:

> With the parties' agreement, the defendants who wish to present this matter into evidence will, within ten days after date (of pretrial conference) provide the plaintiffs with excised portions of it

they wish to present. If plaintiffs are in disagreement, and the parties cannot reconcile their differences then both parties will report any differences to this court with each party providing a memorandum in support of its respective position so that ruling can be made, if at all possible, in advance of trial. (J.A. 35)

No defendant complied with the court's order. None submitted to plaintiffs within ten days following the pre-trial conference what, if any, portions they wanted admitted into evidence.

Nearly ninety days following the deadline set forth in the order, Beech submitted to plaintiff a letter notifying the plaintiffs it wanted the entire JAG Report in evidence.

On July 9, 1984, the parties selected a jury. In mid-afternoon of July 10th, the day before testimony began, the trial judge called counsel to Chambers to announce that he had reversed his prior ruling. The "opinions and conclusions" would, he ruled, be admitted into evidence over the plaintiffs' objection that:

(1) They were inadmissible under the law of this Circuit, *Smith vs. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980).

(2) The ruling, coming as it did hours before testimony was to begin, left the plaintiffs unprepared to attack the trustworthiness of the report, or the basis for the opinion. (J.A. 40-42)[1]

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[1] Beech and BASI contend that plaintiffs conceded the trustworthiness of the JAG Report, but that is not correct and is misleading. The trustworthiness of the findings of fact

(Continued on following page)

The JAG opinion that pilot error was the most probable cause of the crash was admitted into evidence when offered by Beech. The report was enlarged by the defendants as an exhibit for use in final argument (Vol. 7, pp. 70-71) and the attorneys for Beech and BASI argued and referred to it during final argument (Vol. 7-182; 7-194).

(C) Cross-Examination of LCDR John Rainey.

As its first witness Beech called LCDR John Rainey as an adverse witness. (Vol. 5 T. at 60) Rainey's aviation experience, his investigation of the events surrounding the crash of his wife's plane and his knowledge of instructor piloting techniques was thoroughly established by Beech. (Vol. 5 T. at 60-77). That he had talked to most of the witnesses to the crash shortly after its occurrence was established. (Vol. 5 T. at 60-77). That he had with his squadron commander test flown what was thought to be the flight path and final maneuvers of aircraft 955 was also established. (Vol. 5 T. at 73; Shields Dep. 7-11).

These points having been established, Rainey was next examined about a letter that he had written to LCDR Morgan (the JAG investigator). The letter

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was never questioned by plaintiffs, and until July 10, 1984 only the findings of fact, and not the opinions, were admissible by the court's ruling. When the trial judge reversed his ruling to admit the opinions, the plaintiffs expressed their concern for the trustworthiness of them. (J.A. 80-82). The trial began within hours and plaintiffs in fact did not produce evidence of untrustworthiness, but plaintiffs never agreed the opinions were trustworthy.

recited matters he had learned in his investigation and certain opinions he held.[2]

LCDR Rainey was asked if he had written that prior to his wife's flight she had tried to cancel it, and had acted in an "uncharacteristically heated and disgusted manner" when told the flight would not be canceled. Rainey admitted he had written that.

LCDR Rainey was then asked by Beech if in his letter he had made the following statement (the question was framed by reading verbatim from paragraph 4e. of his letter):

> Lt. Colonel Habermacher's plane came into view unexpectedly at its closest point of approach, although sufficient separation still existed between the aircraft. However, the unexpected proximity of Col. Habermacher's plane caused one of the aircrew in Mrs. Rainey's plane to react instinctively and abruptly by initiating a hard right turn away from Col. Habermacher's plane. (J.A. 75, 110, 111).

Rainey admitted he made that statement in the letter as well.

With Rainey's answer to this question Beech was able to leave the impression that Rainey had at one time held the opinion that aircraft 955 had made a voluntary, hard right turn/avoidance maneuver as a

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[2] Though Beech and BASI in their briefs now characterize Rainey's statements as factual, at the in camera hearing Beech's counsel made it clear that he wanted to elicit "opinions" Mr. Rainey expressed in his letter, saying they were "opinions against his interest." (J.A. 44).

result of having failed to take proper interval on Col. Habermacher. Such an opinion would support Beech's pilot error theory and would represent an opinion contrary to the trial testimony his witnesses had just given during his case in chief.

Following Beech's examination of LCDR Rainey plaintiffs' counsel asked him about another opinion he expressed in the next paragraph of his letter, an opinion which demonstrated that Rainey was saying in his letter what his witnesses were saying at trial, that an engine problem caused the crash rather than an abrupt right rolling turn. (J.A. 77, 110, 111). The court sustained Beech's objection to plaintiffs' inquiry into that portion of the letter, though the question pertained to a statement made by Rainey in the same letter upon which he had been cross-examined by Beech, and though it would have placed in context the portions of the letter elicited from Rainey by Beech.

While deliberating the jurors requested that the testimony of one witness be read back to them by the court reporter, that of John Rainey, and it was so ordered by the court. (Vol. 8 T. at 27).

(D) Verdict and Appeals.

Following a two week trial on liability the jury returned a verdict for the defendants. The plaintiffs filed a motion for new trial which was denied on August 17, 1984. The Eleventh Circuit Panel reversed and remanded for a new trial, finding reversible error on two grounds: improper admission of the JAG opinions and undue restriction of Rainey's testimony concerning his letter to the JAG officer. The Eleventh Circuit

reheard the matter En Banc, and again reversed and remanded for a new trial. As to the admissibility of JAG Report opinion under Rule 803(8)(C), the 12-member court was evenly divided, thus leaving the panel opinion intact on that point. The En Banc court unanimously affirmed the panel's opinion that under Rules 106 and 801(d)(1)(B) Rainey's trial testimony had been improperly restricted, constituting prejudicial, reversible error.

SUMMARY OF ARGUMENT

I. *The Supreme Court should construe Rule 803(8)(C) according to its plain meaning and hold that the "factual findings" language of the Rule does not encompass opinions and conclusions.*

(1) The Fifth Circuit's plain meaning approach to defining the scope of Rule 803(8)(C)'s "factual findings" language, as set forth in *Smith vs. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), is not an anomaly among the circuits. It is the same approach followed in the First, Second and (obviously) Eleventh Circuits, and represents the most logical and well reasoned approach to the Rule.

(2) The legislative history of Rule 803(8)(C) compels a plain meaning construction of "factual findings." Those Circuits that have defined *factual findings* to mean *opinions* have resorted to a fair degree of labored construction to get around the plain meaning of the words. Such an approach is unjustified in the absence of clear signals from the Legislature that this is what

was intended. The signals from the Legislature fall far short of the mark to justify construing the Rule other than according to its plain meaning. In fact, the legislative history strongly suggests that the House's construction of the rule emerged, in the end, as Congress' intent.

(3) The JAG Manual requires that an investigator separates his "factual findings" from his "opinions." The JAG Manual defines and distinguishes "factual findings" (the investigator's "evaluation of the evidence and information") from his "opinions" (which are to be the "logical inferences or conclusions which flow from the facts") JAG Manual Chapt. VI, §0608. Because the JAG investigator was required to separate his "findings of fact" from his "opinions," and he followed that mandate, only his "factual findings" should be admissible under the plain meaning of Rule 803(8)(C).

(4) The petitioners have relied upon the analysis of Rule 803(8)(C) contained in 4 J. Weinstein and M. Berger, *Weinstein's Evidence*, §803(8) [03] (1985) in support of their argument that the opinions contained in the Navy JAG Report were properly admitted. *Weinstein* suggests however that some limitation should be placed on the sort of opinions admissible as "factual findings," referring to the term "normative judgments" (a judgment based on authoritative standards). The opinions which were admitted here were more than simply "normative judgments."

(5) Fairness requires an approach to Rule 803(8)(C) that admits trusthworthy "factual findings" but not opinions and conclusions.

II. *The Eleventh Circuit correctly applied Federal Rules of Evidence 106 and 801(d)(1)(B), holding that the trial court, in permitting defendants to examine Rainey about portions of his letter, erred in prohibiting Rainey's testimony as to other parts of his letter that would have harmonized the letter with his trial stance.*

Beech was permitted to call LCDR Rainey as an adverse witness and elicit from him an opinion he had expressed in paragraph 2b. of his letter to the JAG officer concerning his wife's emotional status just prior to flight, and an opinion he expressed in paragraph 4e. of his letter that his wife or student had reacted instinctively and abruptly by initiating a hard right turn away from Col. Habermacher's plane, which had come into view unexpectedly. These opinions were elicited to support defendants' pilot error defense that such a maneuver would stall the T34C even with power available.

To place paragraphs 2 and 4 of his letter in context and overcome the impression that he had once held views consistent with Beech's theory of the case, Rainey's counsel asked him if he had also stated in paragraph 5 of the same letter that the most probable cause of the crash was rollback. (J.A. 77, 111). This would have placed paragraphs 2 and 4 in context, was necessary for the jury to receive a complete picture of the opinions and statements he made to the JAG officer, and would have been consistent with his trial stance and rebutted an implied charge that he had changed his views between the sending of the letter and the trial.

The Eleventh Circuit En Banc correctly held that under Rule 106, Beech had introduced a part of a writing through its questions of Rainey, and that when Rainey's counsel offered another part of the letter to be considered with it, in fairness it should have been permitted. The Eleventh Circuit also correctly held that under Rule 801(d)(1)(B) the statement contained in paragraph 5 of Rainey's letter was properly admissible as a statement made by him that was "consistent with his testimony (trial stance) and is offered to rebut an . . . implied charge against him of recent fabrication. . . ." 801(d)(1)(B), Fed.R.Evid.; *Rainey v. Beech*, 784 F.2d 1523 (11th Cir. 1986).

ARGUMENT

I.

The Supreme Court should construe Rule 803(8)(C) according to its plain meaning, and hold that the term "factual findings" does not encompass opinions and conclusions.

Federal Rule of Evidence 803(8)(C) (hereinafter "Rule 803(8)(C)") provides that as an exception to the hearsay rule that there shall be admissible in civil actions public reports setting forth "factual findings" resulting from an investigation made pursuant to authority granted by law, unless the circumstances indicate lack of trustworthiness.

The issue upon which this Court accepted conflict certiorari is whether Rule 803(8)(C) provides for the

admission of opinions and conclusions contained in reports prepared by public agencies. Stated another way the issue is whether the term "factual findings" is to be accorded its plain meaning and applied so as to exclude opinions or whether "factual findings" is to be construed beyond its plain meaning so as to admit opinions.

(A)

Smith v. Ithaca is not an anomaly among the circuits.

(1) The Fifth Circuit

Smith vs. Ithaca, 612 F.2d 215 (5th Cir. 1980), represents the foundation of the Eleventh Circuit's holding in *Rainey.* Beech and BASI incorrectly suggest *Smith* is no longer viable. We therefore begin our analysis of the Circuits with the Fifth Circuit.

Smith squarely and thoroughly examined whether to admit opinions and conclusions as "factual findings." It looked at 803(8)(C)'s legislative history. It examined the language of Rule 803(6) which, unlike 803(8)(C), expressly admits "opinions." The court then chose to construe the rule according to the literal, plain meaning of "factual findings":

> In deciding how to interpret 'factual findings' in the context of this case, we find instructive reasoning in *Complaint of American Export Lines, Inc.,* S.D.N.Y. 1977, 73 F.R.D. 454, concerning the admissibility of a Coast Guard Marine Board of Investigation Report at a civil trial. First, the language of Rule 803 suggests that 'factual findings' defines something other than 'opinions' and 'diagnoses' which are admissible under Rule 803(6)

> when contained in the records of 'a regularly conducted business activity'. *Id.* at 457. Rule 803(8), although similar to Rule 803(6), substitutes the term 'factual findings' for 'opinions' and 'diagnoses'. Since these terms are used in similar context within the same Rule, it is logical to assume that Congress intended that the terms have different and distinct meanings. *Id.* Second, Coast Guard regulations governing marine investigations expressly state that the investigations 'are for the purpose of taking appropriate measures for promoting of life and property at sea, and are *not intended to fix civil or criminal responsibility.*' 46 C.F.R. §4071(b) . . . . *Id.* at 458 (emphasis in original). *Smith,* 612 F.2d at 221, 222.

The Fifth Circuit held the findings of fact admissible, but excluded "opinions as to liability, conclusions as to the cause of the (vessel's) sinking, or recommendations regarding how to avoid similar disasters in the future." *Smith,* 612 F.2d at 222.

The Fifth Circuit as recently as 1987 has reaffirmed its holding in *Smith.* In *McQuaig vs. McCoy,* 806 F.2d 1298, 1302 (5th Cir. 1987), the Fifth Circuit held inadmissible evaluative opinions and conclusions contained in a police internal affairs report and, in so doing, expressly relied upon its holding in *Smith.* The *McQuaig* court also noted that its position, limiting admissibility to a report's factual parts, has been followed in the Eleventh and Second Circuits.

In *Koonce vs. Quaker Safety Products & Mfg.,* 798 F.2d 700, 720 (5th Cir. 1986), the Fifth Circuit excluded an Army Board of Inquiry memo setting forth opinions flowing from their investigation into a flashfire at an ammunition plant. The court excluded the report because what it set forth were not "characteristic of

'factual findings'," and because the report was untrustworthy. The *Smith* court s literal, plain meaning approach to "factual findings" was cited, discussed and expressly followed.[3]

BASI cites *Muncie Aviation Corp. vs. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975), and *Mac Towing vs. American Commercial Lines*, 670 F.2d 543 (5th Cir. 1982), as authority that the Fifth Circu.. follows a "broad admissibility" versus a literal reading approach to "factual findings." BASI's reliance on these cases is misplaced. *Muncie* preceded *Smith* by five years, involved a case tried prior to the effective date of the Federal Rules of Evidence, and no where in the decision is there discussion of Rule 803(8)(C). *Mac Towing*, a 1982 case decided two years after *Smith*, makes no reference to *Smith*, no reference to Rule 803(8)(C), and relies upon a pre-Federal Rules case as authority for admitting the Coast Guard Report. And, any precedential weight *Mac Towing* might have been accorded has been overcome by *McQuaig* and *Koonce*.

It is thus clear that the Fifth Circuit still very much adheres to its holding in *Smith*. Moreover, in addition to its plain meaning approach being followed in the Eleventh Circuit, it is followed in the First and Second Circuits as well.

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[3] There have been several Fifth Circuit opinions since *Smith* and prior to *McQuaig* and *Koonce*, holding EEOC

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(2) First Circuit

The First Circuit in *Robbins vs. Whelan*, 653 F.2d 47 (1st Cir. 1981), held that a DOT automotive brake performance report would be admissible under Rule 803(8)(C) because it was "factual" in nature. That it was the report's factual nature that made it admissible is evident:

> The vehicle safety performance report meets the *literal requirements* of Rule 803(8)(C). It is a data compilation of a public agency. The *findings* it sets fort are *purely factual*. . . . (Emphasis added.) *Robbins*, 653 F.2d at 50.

The First Circuit has thus made it clear that a "literal" reading of the "factual finding" language is required by Rule 803(8)(C).[4]

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findings of reasonable cause are admissible. (See, e.g., *McClure vs. Mexia Independent School District*, 750 F.2d 396 (5th Cir. 1985); *Garcia vs. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert denied*, 449 U.S. 1113 (1981). Neither the *Garcia* nor the *McClure* decisions make any reference to *Smith*, nor do they make an effort to distinguish an accident investigation report's opinion on causation from an EEOC finding of reasonable cause. Furthermore, neither in *McQuaig* nor in *Koonce* did the Fifth Circuit cite or distinguish the *Garcia* and *McClure* EEOC cases that preceded them.

[4] Contrary to BASI's brief (p. 29), there is nothing in the opinion to indicate the First Circuit believed it was admitting evaluative conclusions of the DOT. In text as well as

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(3) The Second Circuit

In *Lindsay vs. Ortho,* 637 F.2d 87 (2nd Cir. 1980), the Second Circuit held that FDA labeling changes were in the nature of medical opinions and not facts, and were thus inadmissible under 803(8)(C). In so holding, the *Lindsay* court relied upon *Smith vs. Ithaca,* supra, and a pre-Federal Rules case, *Franklin vs. Skelly Oil Co.,* 141 F.2d 568 (10th Cir. 1944).

Lindsay was expressly re-affirmed and followed in 1985 by the Second Circuit in *Stissi vs. Interstate and Ocean Transport Co. of Philadelphia,* 765 F.2d 370 (2nd Cir. 1985). There the Second Circuit held, citing *Lindsay,* that "the district court did not abuse its discretion in redacting the . . . conclusory portions of the Coast Guard Report." *Stissi,* 755 F.2d at 376.[5]

The Fifth Circuit's approach to Rule 803(8)(C) is not an anomaly. It is still good law in the Fifth Circuit, and its construction of the Rule is the same approach followed in the First, Second, and Eleventh Circuits.

The other circuits that have considered this issue have followed a broad admissibility approach. In the interest of completeness we set forth a brief analysis of their rulings and the type report admitted in evidence.

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footnote, the court emphasized that the data in the report consisted of objectively verifiable test results gathered through very precise and standardized testing methods.

[5] There are reported Second Circuit decisions post-*Lindsay* that have held admissible certain evaluative reports under 803(8)(C), but with no citation to and no effort to

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In most cases, it will appear that the opinions admitted were far more "normative" than that admitted in Rainey and Knowlton's trial.

(4) The Third Circuit

Initially the Third Circuit, in *Lloyd vs. American Export Lines,* 580 F.2d 1179 (3rd Cir. 1978), followed the literal, plain meaning approach to 803(8)(C), holding admissible a Coast Guard report's "factual findings." The *Lloyd* court cited with approval the same 803(8)(C) case relied upon by the Fifth Circuit in *Smith,* that of *Complaint of American Export Lines,* 73 F.R.D. 454 (S.D.N.Y. 1977), which held that evaluative conclusions or opinions contained in a Coast Guard Report would not be admissible, but that the "factual findings" would be.

Several months after *Lloyd* was decided the Third Circuit decided *Melville vs. American Home Assurance Co.,* 584 F.2d 1306 (3rd Cir. 1978). There it held admissible certain FAA airworthiness directives. Their admissibility was opposed as constituting opinion and hearsay. Making no reference to their decision in *Lloyd,* the court chose a different construction, following the Advisory Committee's "evaluative reports" approach. A

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distinguish these cases from *Lindsay.* See, e.g., *Litton vs. AT&T,* 700 F.2d 785 (2nd Cir. 1983); *Bradford Trust Co. of Boston vs. Merrill, Lynch, Pierce, Fenner & Smith,* 805 F.2d 49 (2nd Cir. 1986). *Litton* admitted an FCC decision that AT&T's tariffs were unreasonable. *Bradford* held that an FBI report containing expert opinions as to the genuineness of a signature was admissible. *Litton* was decided prior to *Stissi* and *Bradford* was decided after *Stissi.*

similar result was obtained in *Zenith Radio Corp. vs. Matsushita Electric Industrial Co.*, 723 F.2d 238, 265 (3d Cir. 1983).

(5) The Fourth Circuit

There is one Fourth Circuit decision on this 803(8)(C) issue, *Ellis vs. International Platex, Inc.*, 745 F.2d 292 (4th Cir. 1984). It held, as to a Center for Disease Control statistical study with tentative conclusions, that the term "factual findings" is to be construed broadly to include evaluative reports.

(6) The Sixth Circuit

The Sixth Circuit has taken a broad admissiblity approach to "factual findings." In *U.S. vs. School District of Ferndale,* 577 F.2d 1339 (6th Cir. 1978), the Sixth Circuit held admissible an HEW finding that a black school was so maintained for segregation purposes. In *Baker vs. Elcona Homes,* 588 F.2d 551 (6th Cir. 1978), the court held admissible a police report, that an intersection light was red, was "distinctly a factual finding within the meaning of the rule, and certainly far more so than the HEW finding in *Ferndale,* which, we believe, is essentially an evaluative opinion resulting from the evidence." *Baker*, 588 F.2d at 557.

(7) The Seventh Circuit

The Seventh Circuit has addressed this issue in two cases in which EEOC findings of reasonable cause were admitted in a Title VII trial de novo. *Baz vs. Walters,* 782 F.2d 701 (7th Cir. 1986); *Tulloss vs. Near North Montessori School, Inc.*, 776 F.2d 150 (7th Cir. 1985).

(8) The Eighth Circuit

The Eighth Circuit has, like the Fourth Circuit in *Ellis,* held CDC studies admissible. *Kehm vs. Proctor & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir. 1983). As well, EEOC findings of reasonable cause are admissible in the Eighth Circuit. *Johnson vs. Yellow Freight System,* 734 F.2d 1304 (8th Cir. 1984).

(9) The Ninth Circuit

The Ninth Circuit has held EEOC findings of reasonable cause admissible in a Title VII trial de novo. *Plummer vs. Western International Hotels Company, Inc.*, 656 F.2d 502 (9th Cir. 1981).

(10) The Tenth Circuit

The Tenth Circuit in *Perrin vs. Anderson,* 784 F.2d 1040 (10th Cir. 1986), held admissible a police internal investigation report that contained conclusions concerning the propriety of a police officer's conduct.

(B)

The legislative history of Rule 803(8)(C) compels a plain meaning construction.

Much judicial comment has centered around the differing House and Senate Judicial Committee views on the construction to be placed on the "factual findings" language of Rule 803(8)(C). The House Committee's stated intention was that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." *Report of the Committee on the Judiciary*, H.R. Rep. No. 93-650, 93rd Cong., 1st Sess. 14 (1973) *reprinted in* 1974 U.S. Code

Cong. & Admin. News 7064. The Senate Committee took "strong exception to this limiting understanding of the application of the rule," saying they did not think it reflected an "understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection." *Report of the Committee on the Judiciary*, S. Rep. No. 93-1277, 93rd Cong., 2d Sess. 18 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7064. Because respondents believe greater weight should be placed on the House's stated intention, a thorough look at the development of the Rules of Evidence is important.

The Federal Rules of Evidence originated from a draft prepared by an Advisory Committee appointed by the United States Supreme Court. When the Advisory Committee's work was finished and forwarded to the Supreme Court, the Court then entered an order that promulgated the Federal Rules of Evidence and, on February 5, 1973, transmitted the proposed rules to Congress. 1974 U.S. Code Cong. & Admin. News, at 7077.

Because Congress recognized the "importance and the enormity of the task before it, and in light of the serious question raised by Mr. Justice Douglas, in dissenting to the Supreme Court Order, as to the authority of the Supreme Court to promulgate rules of evidence," Congress enacted Public Law 93-12, which provided the Rules would not be effective until expressly approved by Congress. 1974 U.S. Code Cong. & Admin. News, at 7077.

Hearings on the rules began on February 7, 1973, before the House Judiciary Sub-Committee on Criminal Justice. The proposed Rules were placed before the subcommittee in legislative form as House Bill H.R. 5463. On the opening day of hearings, the Judicial Conference Chairman on Rules of Practice and Procedure, Judge Albert B. Maris, testified that the adoption of the Federal Rules of Evidence would provide "*clear, precise* . . . rules for trial judges and trial lawyers to follow," which would be "*uniformly applicable* throughout the Federal judicial system." (Emphasis added.) 1974 U.S. Code Cong. & Admin. News, at 7075.

Six days of hearings were held, a volume of written comments was received and a 600-page hearing record was compiled. Between March 21st and June 22nd, 1973, the sub-committee held 17 markup sessions out of which emerged on June 28, 1973, a Committee Print of H.R. 5463. The Print was circulated nationwide for comment and printed in the Congressional Record. Over the following six weeks 90 written commentaries were received from interested people and organizations. "Chief Judge Friendly wrote ' . . . if there are to be Federal rules of evidence, I do not see how there could be much better ones than your Subcommittee has proposed'." Five more markup sessions followed. The final Committee Print was, with some further amendments, approved by the sub-committee on October 10, 1973. Following debate, the full House Judiciary Committee ordered H.R. 5463 favorably reported. 1974 U.S. Code Cong. & Admin. News, at 7077, 7078.

It was following this thorough amendment process that the House Judiciary made it clear that the phrase

"factual findings" should be strictly construed and that "evaluations or opinions in public reports shall not be admissible." Taking into account the thoroughness of the House's review process prior to transmitting the rules to the Senate, it cannot be seriously contended that the House Judiciary Committee either misunderstood or overlooked what the Advisory Committee intended to be the meaning of "factual findings."

The House quite obviously studied and understood the Advisory Committee's notes and expressly rejected a "broad admissibility" approach to the Rule. It cannot be ignored that the Rules ultimately took the form of a House Bill. The House Sub-Committee and the Full Committee concluded that the Supreme Court did not have the authority to promulgate the Rules, and H.R. 5463 was a demonstration of that view as well as a demonstration of the "view as to what should be the content and scope of a uniform code of evidence." 1974 U.S. Code Cong. & Admin. News, at 7076. It should also be noted that the House amended close to fifty percent of the rules, but left the language of Rule 803(8)(C) intact, disagreeing not with the Rule, but the Advisory Committee's comment to it.

Had the Senate insisted that their approach to "factual findings" be part of the Rule, the wording of the Rule should have been amended to add the words "opinions and conclusions." Leaving those words out is a significant omission when considered in light of the plain meaning ordinarily of the words "factual findings" and the express intent of the House. The Federal Rules

of Evidence were ultimately codified by Congress' passage of the rules as a House Bill. H.R. 5463 was thoroughly studied. Many changes were made before the bill left the House. A 600-page record was gathered. There were 22 mark-up sessions and several re-drafts. When the Rules left the House Judiciary Committee they were clarified with a statement of intent in the clearest possible terms – "that the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions shall not be admissible. . . ." The Senate took exception, by way of comment, to the House's strict approach, but made no amendment. As a House Bill, unchanged by the Senate, the House's intent should be accorded significant weight.

(C)

The JAG Manual itself makes an express distinction between "factual findings" and "opinions and conclusions."

(1) Nature of the JAG investigation.

Pursuant to the authority of the JAG Manual, Chapters VI and IX, LCDR Morgan was appointed by his squadron commander to perform an informal, one-man JAG Manual investigation into the circumstances connected with the aircraft crash killing LCDR Rainey and Ensign Knowlton. (JA 141,142) A "JAG Manual Investigation" is an administrative fact-finding body, and may include (as it did here) single individuals functioning as an informal fact-finding body. JAG MAN 0201 a. (1) and (2); 0601.

The investigation's purpose is to provide military convening and reviewing authorities with adequate information upon which to base decisions. Specific purposes to be served include: (1) efficient command or administration of the fleet; (2) proper disposition of claims for or against the government; (3) redress of property damage, and (4) administrative determinations regarding military personnel. JAG MAN 0202 b., c., d. and e. The JAG MANUAL does not state anywhere that the investigation is intended to fix civil or criminal responsibility.

The report is purely advisory. The opinions of the investigator do not constitute final determinations or legal judgments. JAG MAN 0201c. The investigation may be conducted by any officer, enlisted person or mature civilian employee. JAG MAN 0601. There is no requirement that the investigator have any experience in accident investigation, or have any particular skills for ascertaining the cause of the accident that he is to investigate. The investigator is not required to take statements from witnesses under oath, JAG MAN 0204 d. (1)-(6), and he "may employ any method which (he) finds most efficient and effective in performing (his) investigative function." JAG MAN 0605.

(2) Nature of the report.

The JAG Manual Investigation Report must contain four parts, including separately designated "Findings of Fact" and "Opinions." JAG MAN 0608 a., b., c., d., e. What is meant be the term *"findings of fact"* is clearly described in the Manual:

> The findings of fact represent the evaluation of the evidence and information received and collected. These findings must be as specific as possible as to time, places, persons, and events. JAG MAN 0608 c.

What is meant by the term *"opinions"* is also clearly described in the Manual:

> Opinions are the logical inferences or conclusions which flow from the facts. The Investigation will express its opinions when directed to do so by the convening authority. JAG MAN 0608 d.

It is quite apparent that the Navy Judge Advocate General draws an easy distinction between *"findings of fact,"* representing the investigator's *evaluation of the evidence*, and *"opinions,"* which are the *logical conclusions that flow from the facts*. The investigator was required by his commander in his letter of appointment and by the provisions of the JAG Manual to make separate "findings of fact" and "separate opinions." LCDR Morgan did that. He set them forth in his Report. There was no mistake in his mind or in his report as to what was factual and what was opinion.

This Court needs to decide the issue presented here in the context of the Navy JAG Report prepared pursuant to the requirements outlined above, and should hold that when a JAG Report's author separately sets forth what is factual and what is opinion, Rule 803(8)(C) compels the exclusion of his opinions.

(D)

***Weinstein's Evidence*, cited in support of the broader application of Rule 803(8)(C), suggests that there should be some limitation on the extent to which opinions may be admitted as "factual findings."**

The petitioners have relied upon *Weinstein's Evidence*, supra, in support of the "broad admissibility" approach to Rule 803(8)(C). But even *Weinstein* suggests that there should be some limitation on the extent to which opinions may be admitted as findings of fact. In its discussion of Rule 803(8)(C), the treatise contains a discussion of the extent to which courts have sanctioned the admission of opinions under the definition of "factual findings." The treatise advocates that "[i]f the report states a conclusion that would be helpful – and is reliable – it should be admitted." Vol. 4, p. 803-251. *Weinstein* also quotes with approval the opinion of a District Judge who, after an extensive review of the Rule 803(8)(C) cases, stated it is now generally accepted that "evaluative reports of public agencies (i.e., those rendering *normative* judgments or opinions, not just reciting facts) are admissible."[6] Even if some "opinion" may be admissible under the more liberal view embraced by the majority, *Weinstein* indicates that limits should be placed on it. That is, only evaluative reports reciting "normative judgments or opinions" should be admissible under Rule 803(8)(C), if indeed evaluative reports should be admissible at all.

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[6] Citing *Zenith Radio Corporation v. Matsushita Electric Industries Co., Ltd.*, 505 F.Supp. 1125 (E.D. Pa. 1980).

A norm is an authoritative standard. *Websters New Collegiate Dictionary*, 776, 1980 Edition. Normative conclusions are therefore reasoned judgments or inferences that relate to or conform to authoritative standards.

Rainey and Knowlton respectfully suggest to the Court that an aviation accident probable cause opinion, which must take into account turbine engine expertise, propeller blade angle expertise, aerodynamics and a vast amount of circumstantial evidence is far more than a "normative conclusion." It is also far from being an opinion of a type "all persons skilled in the art would likely reach," nor is it a conclusion "based upon directly observable facts or well-known tests."[7] The CDC studies admitted in *Ellis* and *Kehm* and the FAA airworthiness directives admitted in *Melville* are perhaps better examples of "normative conclusions," better examples of opinions all similarly skilled persons would more likely reach, and better examples of conclusions grounded on established tests or directly observed facts.

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[7] *Skogen v. Dow Chemical Company*, 375 F.2d 692, 705 (8th Cir. 1967). This pre-federal evidence rules case involved the admission of expert opinion contained in a business record. The court recognized that such records may, of necessity, contain some basic conclusions, but that there is a point at which expert and non-expert opinion evidence as to the critical issues of causation will be objectionable. Holding that the conclusion of causation contained in the hospital records was inadmissible, the court stated:

> This conclusion of causation is not one that all persons skilled in the art would likely reach. [Citations omitted throughout.] It is a conclusion not based upon directly

(Continued on following page)

Even if this Court should find that evaluative reports (rendering normative conclusions) should be admissible under Rule 803(8)(C), official reports should not become a vehicle for admission into evidence of *every* opinion as a "finding of fact." Opinions that go *beyond* those based upon directly observable facts or well known tests, and *beyond* being a conclusion that all persons skilled in the art would likely reach, the opinions should be inadmissible as being too far removed from what could fairly be characterized as a "factual finding." Such opinions, particularly those in complicated cases going to the very issue the jury must decide, can become a substitute for the jury's decision

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(Continued from previous page)

observable facts or well-known tests. Of necessity it is *purely the conclusion of one man*, based upon an evaluation judgment which *he alone* placed upon a number of variable factors and which he was not obligated by law to make. In this case, the party making the conclusionary statement was not shown to be unavailable to testify. *If plaintiffs desired the jury to have the benefit of this expert conclusion, they should have called the person who made it, properly qualified him as an expert, and have him so testify in front of the jury.* Otherwise, under both Minnesota and Federal practice, this expert opinion is inadmissible hearsay. We do not believe plaintiffs should be allowed to present to the jury this otherwise inadmissible conclusion as to the cause of plaintiffs' condition *simply because it fortuitously appears in a hospital record, and thereby deny to defendants the protection afforded by an oath and the opportunity to cross-examine the witness.* This type of conclusion on the highly controversial ultimate issue of the cause of the plaintiffs' condition does not qualify as an entry made 'in the regular course of *** business' and is consequently inadmissible. (Emphasis added.) *Skogen*, 375 F.2d at 705.

and become, therefore, helpful only to the party offering the opinion. The jury does not *need* and should not be given such "help" from authors of governmental reports who are not even present at trial to testify and be cross-examined. It is the litigants themselves who can and should bring to the courtroom the expert testimony needed for their respective cases.

(E)

It is unfair to admit into evidence a written opinion that goes to the heart of the jury issue, rather than offering the opinion through the witness himself.

The trial of this case in the District Court below was lengthy and complicated. Naval and civilian aviators and turbine engine experts as well as aerodynamicists and variable-pitch propeller experts offered opinion testimony going to the pivotal issue – whether Aircraft 955 crashed due to a fuel control system design defect-induced "rollback," or due to pilot error in inadvertently stalling the aircraft in a surprised turn-reaction to another aircraft in the landing pattern. There was a very real and hotly contested jury issue presented on this issue of causation.

Within this context the trial court admitted the Navy JAG Report and opinion as to the most probable cause of the crash of 955. It came in only in writing; it came in though Rainey and Knowlton had been assured in a written pre-trial order that it would *not* come in. It came in and was enlarged to a "larger than life" demonstrative exhibit that carried the prestige and authority embodied in the office of the Judge Advocate General's office.

The opinion was that, in the context of this lawsuit, pilot error not engine defect caused 955's crash. It was admitted following a reversal by the trial court of its pre-trial ruling, announced hours before the trial was to begin. The opinion gave authoritative, credible support to Beech and BASI's pilot error defense, and it came in without any realistic opportunity to locate, subpoena and cross-examine its author.

If each side of such a controversy has at its disposal the resources to adequately prove its case and to give the jury the evidence it requires to make its decision, why should an official government probable cause opinion be shown to them? How is the jury to evaluate the evidence for themselves and reach an objective, independent, fair and impartial verdict based on the evidence? How does a jury learn whether there may be some fundamental weakness in the opinion on the ultimate issue without hearing its author cross-examined by opposing counsel? Rainey and Knowlton respectfully suggest that these questions answer themselves. The bottom line is that when a party is permitted to offer into evidence a written opinion on the ultimate jury issue prepared by a governmental officer, that party is given unfair advantage in the litigation.

II.

The Eleventh Circuit correctly held that, in permitting defendants to examine Rainey about portions of his letter to the JAG officer, the trial court erred when it prohibited cross-examination of Rainey about other relevant portions of the letter that would have harmonized the prior statements.

Beech, calling Rainey first as an adverse witness, questioned him about a letter he had written to the Naval officer who authored the JAG report. Reading portions of paragraphs 2 and 4 of his letter into the record, Beech asked Rainey if he had made the statements. He acknowledged them. These statements read alone supported Beech's pilot error defense. Rainey's attorney then asked him if he had made, in paragraph 5 of the same letter, the statement that the most probable cause of this mishap was rollback (engine defect). Paragraphs 2 and 4 by themselves appeared *inconsistent* with Rainey's trial theory presented during his case in chief. Paragraph 5 was *consistent* with his trial stance. The trial judge refused to allow Rainey to introduce his statement from paragraph 5 of his letter because it was opinion of a non-expert. Counsel attempted to persuade the trial judge to admit Rainey's testimony on the basis that Beech had been allowed to put other portions of the letter in. The court sustained Beech's objections. (J.A. 77, 78).

By way of introduction to this issue factual adjustments must be made to the Beech and BASI briefs on the issue of Rainey's examination. Beech's characterization of the parts of the letter *they* introduced through

Rainey as "factual" and their characterization of the parts Rainey wanted introduced as "opinion" is not only false, but irrelevant to the admissibility question either under Rule 106 or Rule 801(d)(1)(B). It is true Rainey was asked by his attorney about an opinion he expressed in paragraph 5 of the letter. It is also true that Rainey was asked by Beech about opinions he expressed in paragraphs 2 and 4 of the letter. Not only did Beech characterize them to the court as "opinions" (J.A. 43, 44), but it is obvious from the content of those paragraphs that Beech asked Rainey about "opinions" he had expressed (J.A. 75, 111).

The Eleventh Circuit correctly ruled that the refusal to admit the testimony of Rainey as to paragraph 5 was reversible error:

> Because paragraph five of the letter would have harmonized the prior statements with Rainey's stance at trial, the jury was given an incomplete and misleading impression of Rainey's position. Under the "rule of completeness" embodied in Rule 106, the limitation of Rainey's testimony was thus inherently unfair and an abuse of discretion. Rainey and Knowlton are entitled to a new trial. *Rainey v. Beech,* supra (J.A. 131, 132).

The Eleventh Circuit also agreed that Rule 801(d)(1)(B) permitted the admission of Rainey's prior consistent statements to rebut the implied or express charge that in other parts of his letter he had made statements inconsistent with his trial stance.

Rule 106 permits introduction of other parts of a writing when portions of it have been introduced by a party, when in fairness those other parts ought to be considered. The Eleventh Circuit felt that paragraph 5

of Rainey's letter needed to be considered, in fairness, with the statements he made in paragraphs 2 and 4. Petitioners argue that Rule 106 is inapplicable here because there was "no effort by counsel for Mr. Rainey to offer into evidence the rest of the letter." As the Eleventh Circuit noted in footnote 10 of its panel opinion, while an "offer of proof " was not made, such is not required if the substance of the evidence is apparent from the context of the question. Fed.R.Evid. 103(a)(2). Moreover, Rainey's counsel attempted to offer paragraph 5 into evidence in the same fashion Beech offered paragraphs 2b. and 4e. – by a verbatim reading from the letter by counsel when the question was framed. Rule 106 clearly required admitting Rainey's testimony.

When Rainey took the stand, called by Beech as its first witness, the jury had just heard a week's testimony from Rainey's witnesses that a defect in the fuel control system – rollback – had caused his wife's aircraft to rapidly stall and crash. Beech then used selected parts of Rainey's letter to show that he had made statements well prior to the trial that, read alone, suggested he had once held views different from what his witnesses were saying at trial. While Rainey may not have made, at the trial himself, a prior inconsistent statement, the entire case he had just presented was inconsistent with the inference drawn from paragraphs 2 and 4 of his letter. This is a situation that Rule 801(d)(1)(B) was intended to correct. Paragraph 5 of his letter was *expressly consistent* with his entire case in chief, and not allowing it in denied Rainey an opportunity to rebut an implied charge that his entire case in

chief was a recent fabrication and inconsistent with his earlier letter.

CONCLUSION

The United States Supreme Court should construe Rule 803(8)(C) according to its plain, common sense meaning and hold that the term "factual findings" does not encompass, and the Rule does not allow, admission of opinions. The Rule's legislative history, and particularly the history of the Bill as it emerged from the House with their construction carefully explained in a comment, compels a plain meaning approach. Where, as here, the authority of law (JAG Manual) and the report authorized by the law expressly define and designate what is a "factual finding" and what is an "opinion," Rule 803(8)(C) must be limited in scope so as to allow only the report's "factual findings." The Eleventh Circuit's holding in this case should accordingly be affirmed.

The Eleventh Circuit's unanimous En Banc opinion was entirely correct that Rule 106 requires reversal for limiting Rainey's testimony. It is a clear example of a party obtaining an unfair advantage by offering only parts of a letter, which thereby creates a misleading impression. The panel was also correct in its reversal under Rule 801(d)(2)(A) because paragraph 5 of Rainey's letter was admissible as a prior consistent statement made by him offered to rebut an express or

implied charge that in other parts of the letter he had made statements inconsistent with his trial theory.

Respectfully submitted,

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Supreme Court, U.S.
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CLERK

(5) (2) (2)

Nos. 87-981, 87-1028, 87-1146
Consolidated

In The
Supreme Court of the United States
October Term, 1987

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES, INC.,
and PRATT & WHITNEY CANADA, LTD.,

Petitioners,

vs.

JOHN C. RAINEY,

Respondent,

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES, INC.,
and PRATT & WHITNEY CANADA, LTD.,

Petitioners,

vs.

RONDI M. KNOWLTON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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The three petitions for certiorari were filed by Beech on December 15, 1987 (Case No. 87-981), by BASI on December 18, 1987 (Case No. 87-1028) and by Pratt & Whitney on December 18, 1987 (Case No. 87-1146) The writ(s) of certiorari were granted on February 29, 1988.

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* A catalog of the (60) attachments is included in the reproduced report of LCDR Morgan but the 159 pages of attachments and the chain of command endorsements have been omitted.

** Reproduction of the Complaint and Answers in the Knowlton case are omitted in the interest of brevity. Counsel are agreed that the operative allegations were the same as in the Rainey pleadings.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN C. RAINEY, individually,
and as Personal Representative
of the Estate of BARBARA A.
RAINEY,

CASE NO. 83-4084

Plaintiff,

vs.

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES, INC.,
and PRATT & WITNEY AIRCRAFT OF
CANADA, LTD.,

Defendants.

_____/

RONDI M. KNOWLTON, individually and
as personal representative of the
Estate of DONALD BRUCE KNOWLTON,

CASE NO. 83-4085

Plaintiff,

vs.

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES, INC.,
and PRATT & WITNEY AIRCRAFT OF
CANADA, LTD.,

Defendants.

_____/

ORIGINAL JAG REPORT OF LIEUTENANT COMMANDER WILLIAM C. MORGAN, JR., U.S.N. CONCERNING JULY 13, 1982 AIRCRAFT ACCIDENT, AS ORIGINALLY CONSIDERED BY THE DISTRICT COURT

(Enclosures and Endorsements Deleted)

(Filed September 1, 1982)

From: Lieutenant Commander William C. MORGAN, Jr., USN, 1310

To: Commanding Officer, Training Squadron THREE

Subj: Investigation to Inquire into the Circumstances Connected with the Aircraft Accident which Occurred at Approximately 1020, 13 July 1982, Approximately Two Miles Southeast of Middleton Airport in Evergreen, Alabama

Ref: (a) JAG Manual Chapter VI and Section 0902, Chapter IX

Encl: (1) Commanding Officer, Training Squadron THREE appointing order VT-3:11020:my, 5830 of 14 July 1982

(2) Investigation Officer's letter of 12 August 1982 with First Endorsement

(3) Training Squadron THREE 131650Z JUL 82, OP-REP-3Navy Blue/N0393A/001

(4) Personnel Data Base Transactions for LCDR Barbara A. Rainey

(5) Extract from LCDR Rainey's NATOPS Qualification Record

(6) Extract from LCDR Rainey's Standardization Record

(7) Summary of LCDR Rainey's Naval Flight Record

(8) Extract from LCDR Rainey's Aviators Log Book

(9) Training Air Wing FIVE Memorandum of 20 May 1982

(10) Summary of Investigation Officer's Review ENS Knowlton's Administrative and Aviation Records

(11) Extracts from LCDR Rainey's Medical Record

(12) Extracts from ENS Knowlton's Medical Record

(13) Training Squadron THREE's Flight Schedule for 13 July 1982

(14) Extracts from Aircraft Bureau Number 160955 Aircraft History and Inspection Records

(15) Copy of Aircraft Bureau Number 160955's Outstanding Maintenance Action Form

(16) Aircraft Technical Directive No. T-34C-0147 Cover Page

(17) COMNAVAIRSYSCOM 142257Z AUG 81

(18) COMTRAWINGFIVE 022225Z FEB 81

(19) CNO 251703Z JUN 81

(20) CNATRA 092029Z APR 81

(21) COMTRAWINGFIVE 191930Z OCT 79

(22) Aircraft Acceptance and Personnel Record of 13 July 1982

(23) North Whiting Tower Traffic Control Strip of 13 July 1982

(24) Naval Oceanography Command Detachment Form 3750 of 13 July 1982

(25) Statement of LTCOL David I. Habermacher, Jr., USMC

(26) Statement of LT M. P. Hansell, USNR

(27) Statement of ABHAN S. F. Rodgers, USN

(28) Statement of ABHI R. S. Scribner, USN

(29) Statement of 2LT B. D. Pearson, USMC

(30) Statement of ENS W. P. Arrington, USNR

(31) Statement of LT Craig C. Colley, USN

(32) Extract from Naval Air Training Command, Flight Training Instruction, Familiarization Primary, T-34C, 1981

(33) Statement of LCDR Richard E. Blake, USN

(34) Statement of ABH2 Jimmy Wayne Smith, USN

(35) Statement of ABH3 C. A. Miller, USN

(36) Statement of LT Ted J. Choley, USN

(37) Extract from North Whiting Field Operations Duty Officer Log of 13 July 1982

(38) Extract from Middleton Field Crash Crew Log of 13 July 1982

Subj: Investigation to Inquire into the Circumstances Connected with the Aircraft Accident which Occurred at Approximately 1020, 13 July 1982, Approximately Two Miles Southeast of Middleton Airport in Evergreen, Alabama

(39) Extract from HT-18 Operations Duty Officer Log of 13 July 1982

(40) HC-16 Rescue Report of 13 JUL 82

(41) Aerial Photographs of Crash Site

(42) Summary of Investigation Officer's Review of Official Records and Land Deeds Located

at the Conecuh County Courthouse in Evergreen, Alabama

(43) Statement of MAJ T. E. Allen, USMC

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(45) Statement of LT Thomas R. Little, USN

(46) Report of Casualty, DD Form 1300 of 15 JUL 82 ICO LCDR Barbara A. Rainey

(47) Report of Casualty, DD Form 1300 of 16 JUL 82 ICO ENS Donald Bruce Knowlton

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(50) Photographs of Failing Rotary Buckle Retrieved from the Front Cockpit of 3E955

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(52) Statement of LCDR G. M. Daniels, MC, USN

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(54) Statement of Rondi Knowlton, wife of ENS Donald B. Knowlton

(55) Diagram of Middleton Field Traffic Pattern

(56) Diagram of Wreakage of 3E955

(57) Summary of the 72 Hours Preceeding the Flight of LCDR Barbara A. Rainey as provided by LCDR John Rainey

(58) Copy of Original Claim of Mr. William W. Ward, Standard Form 95

(59) Copy of Autopsy Protocol and Toxicology Report of LCDR Barbara A. Rainey

(60) Copy of Autopsy Protocol and Toxicology Report of ENS Donald Knowlton

PRELIMINARY STATEMENT

1. As directed by enclosure (1) and in accordance with reference (a), an informal investigation was conducted into the circumstances surrounding the aircraft accident which occurred Southeast of Middleton Airport near Evergreen, Alabama, on 13 July 1982.

2. All reasonably obtainable evidence has been compiled and examined during the course of the investigation and all directives of the convening authority have been met. Certain real evidence collected by the Aircraft Accident Board was also obtained, however, considerable care was taken to ensure a separate and accurate investigation.

3. All claims and potential claims for damages by landowners have been investigated. The original claim of Mr. William W. Ward has been hand carried to Naval Legal Service, Pensacola, Florida. No estimates were required with this claim based on a phone conversation with LCDR G. F. Indest of the Naval Legal Service in Pensacola, Florida. The other property owner involved, Mr. Roger Warrick of Gauiter, Mississippi, has been notified of the accident and furnished Standard Form 95 by registered mail.

4. Several witnesses were found that heard the radio transmissions and saw the aircraft just prior to the crash. They all seemed rational and observant. Witnesses inter-

viewed were not designated as parties to the investigation and all were advised of the nature of the JAG investigation.

5. The unusual length of time required to complete this investigation was due to the delay in receiving the autopsy reports on the two pilots and the delay in receiving the engineering investigation on the engine of aircraft 3E955. Additional delays were due to the research required to validate points brought out in the engineering investigation.

FINDING OF FACT

1. At approximately 1020 local on 13 July 1982, a U.S. Navy T-34C aircraft, bureau number 160955, piloted by LCDR Barbara A. Rainey crashed approximately two miles Southeast of Middleton Airport near Evergreen, Alabama, (enclosure (3)).

2. LCDR Barbara A. Rainey, 558-72-0652, USNR, reported to Training Squadron THREE on 16 November 1981, (enclosure (4)). At the time of the accident LCDR Rainey was fully NATOPS qualified (Naval Air Training and Operation Procedures Standardization Program) and Instrument qualified (enclosure (5)) as well as being a qualified familiarization instructor, (enclosure (6)). As of 12 July 1982, LCDR Rainey had accumulated 1331 total flight hours of which 209 were logged in the T-34C total craft. LCDR Rainey had logged 96.2 hours during the 90 days preceeding the accident, (enclosure (7)). LCDR Rainey's Aviator's Log Book indicated no record of previous accidents or flight violations, (enclosure (8)).

3. ENS Donald B. Knowlton, 548-04-6268, USNR, was on active duty and checked into Training Squadron THREE

on 24 May 1982 for duty as a Student Naval Aviator, (enclosure (9)). He had an average flight grade of 2.94 and had accumulated 4.5 hours in the T-34C aircraft, (enclosure (10)).

4. LCDR Rainey was physically qualified for flight duty and was in a flight status on 13 July 1982, (enclosure (11)).

5. ENS Knowlton was physically qualified for flight duty and was in a flight status on 13 July 1982, (enclosure (12)).

6. LCDR Rainey and ENS Knowlton were scheduled to fly Familiarization Flight Four at 0645 on 13 July 1982 by Training Squadron THREE's flight schedule authorizing the flight, (enclosure (13)).

7. Aircraft 160955, A T-34C, was accepted by the Navy on 26 September 1978. Inspection of the aircraft records, history, and logs, revealed that all required maintenance inspections and technical directives had been complied with, (enclosure (14)). There was one outstanding discrepancy, the air-conditioning ground blower door spring was broken, (enclosure (15)).

8. Aircraft Technical Directive No. T-34C-017 which was designed to provide a manual back-up system for fuel metering, (enclosure (16)), was not installed, (enclosure (14)). Although much has been written about the need for a manual fuel control, (enclosures (17), (18), (19), (20) and (21)), it is still not installed in the T-34C aircraft, (enclosure (14)).

9. LCDR Rainey and ENS Knowlton were issued aircraft 160955 and LCDR Rainey signed the acceptance sheet

thereby assuming the responsibility of pilot in command, (enclosure (22)).

10. Review of North Whiting Tower traffic control strips for 13 July 1982 show that aircraft 160955 (3E95) departed North Whiting Field at 0915 local under VFR conditions, (enclosure (23)).

11. The weather observed indicated no conditions that would have a direct effect on the flight, (enclosure (24)). Weather in the Middleton pattern was excellent with no clouds, visibility 5 miles or more, and winds light and from the south, (enclosures (25), (26), (27) and (28)).

12. At approximately 1001, 3E955 entered the pattern at Middleton Field for Runway 18. At least four approaches were flown with a minimum of two "touch and go's" completed prior to the accident, (enclosure (28)).

13. At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned, (enclosures (25), (27), (29), (30), (31) and (32)).

14. Upon receiving notification of a crash and seeing smoke to the southeast of Middleton Field, the crash crew immediately began transit to the crash site, (enclosure (27), (28) and (29)).

15. The wreakage of 3E955 crashed into a farmer's field of cutover timber with scattered trees in the area. The area has slightly rolling hills with a small dirt road passing near the crash site, (enclosure (41)).

16. 3E955 crashed on property owned by Mr. Roger Warrick. Transit to the crash site required that the crash crew

and other vehicles cross property owned by Mr. William W. Ward, (enclosure (42)).

17. During the transit to the crash site, the crash crew had difficulty in locating the wreakage due to the muddy road conditions and the circuitous route required to go around a small stream and fallen trees. Additionally, there were no current, detailed maps of the local area available to the crash crew. 3E467, piloted by LCDR Richard E. Blake, was over the crash site and assumed on scene command and attempted to direct the crash crew to the wreakage, (enclosure (27), (28), (31) and (33)).

18. ABH1 R. S. Scribner stated that at approximately 1022 local, he stopped the crash truck and picked up a civilian who assisted in locating the wreakage of 3E955, (enclosure (28)).

19. LT Ted J. Choley stated that at approximately 1030 local, he received a call from LT Will Carpenter on the base radio stating that there was an accident at Middleton Field, (enclosure 36)).

20. At 1035 local, North Whiting Field operations was notified of a possible aircraft accident near Middleton Field, (enclosure 37)).

21. Upon arrival at the wreakage at 1040 local, the crash crew immediately began efforts to extinguish the fire using AFFF (lite water) and attempted to locate survivors. No response was heard to ABH1 Scribner's call to crew members of the aircraft. The burned bodies of both pilots were noted at this time, (enclosures (27), (28), (34) and (35)).

22. When all the AFFF (lite water) on the truck was depleted, the crash crew used all of the portable fire extinguishers on the truck in an attempt to put out the fire. When this failed, they resorted to shoveling dirt on the fire in an attempt to smother it, (enclosures (27), (28), (31), (34) and (35)). At 1042 local, all fires were extinguished with the exception of a magnesium fire which the crash crew was unable to put out, (enclosure (38)).

23. LCDR Rainey sustained a lethal neck injury at impact but bodily functions continued for an undetermined period, (enclosures (52) and (55)).

24. ENS Knowlton was killed instantly due to massive head injuries sustained at impact. (enclosures (52) and (56)).

25. At some undetermined point in the crash sequence, the rotary buckle holding the shoulder straps of the front cockpit harness failed, (enclosure (50)).

26. At some point during the flight or the subsequent crash, a LPA (life preserver assembly) inflation lever was moved to activated position, (enclosure (51)).

27. At the time of impact, the engine of 3E955 was operating but was operating at reduced power, (enclosure (48)).

28. At 1050 local, HT-18 launched aircraft 171 as a SAR (search and rescue) mission to Middleton Field, (enclosure 39)). The aircraft arrived at the crash site at 1125 local and assumed on scene command from 3E467. 3E467 was relieved from communications relay duties at 1130 local, (enclosure (33)).

29. Upon landing at the site, the crew of aircraft 171 was informed that there were no survivors, (enclosures (43), (44) and (45)).

30. At 1050 local, HC-16 was notified by phone of an aircraft accident near Middleton Field. At 1105 local, a UH-IN launched and proceeded to the crash site., arriving there at 1150 local. Upon landing, HC-16 was requested to transport the bodies of the victims to NARMC (Naval Aerospace Regional Medical Center). The remains of the pilots were removed from the wreakage, placed in body bags, and moved to the helicopter. Takeoff from the crash site was at 1430 local and arrival at NARMC was at 1515 local. The remains were taken from the helicopter and placed in an ambulance for transportation to the hospital, (enclosure (40)).

31. An Engineering Investigation was conducted on the engine of aircraft 160955 by the Naval Air Rework Facility, NAS Pensacola, Florida, (enclosure (48)).

OPINIONS

1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically, or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

5. Because both pilots were killed in the crash and because of the nearly total destruction of the aircraft by fire, it is almost impossible to determine exactly what happened to Navy 3E955 from the time it left the runway on its last touch and go until it impacted the ground. However, from evidence available and the information gained from eyewitnesses, a possible scenario can be constructed as follows:

a. 3E955 entered the Middleton pattern with ENS Knowlton at the controls attempting to make normal landings.

b. After two unsuccessful attempts, LCDR Rainey took the aircraft and demonstrated two landings "on the numbers". After getting the aircraft safely airborne from the touch and go, LCDR Rainey transferred control to ENS Knowlton.

c. Due to his physical strength, ENS Knowlton did not trim down elevator as the aircraft accelerated toward 100 knots; in fact, due to his inexperience, he may have trimmed incorrectly, putting in more up elevator.

d. As ENS Knowlton was climbing to pattern altitude, he did not see the aircraft established on downwind so he began his crosswind turn. Due to ENS Knowlton's large size, LCDR Rainey was unable to see the conflicting traffic.

e. Hearing the first call, LCDR Rainey probably cautioned ENS Knowlton to check for traffic. Hearing the second call, she took immediate action and told ENS Knowlton she had the aircraft as she initiated a turn toward an upwind heading.

f. As the aircraft was rolling from a climbing left turn to a climbing right turn, ENS Knowlton released the stick letting the up elevator trim take effect causing the nose of the aircraft to pitch abruptly up.

g. The large angle of bank used trying to maneuver for aircraft separation coupled with the abrupt pitch up caused the aircraft to stall. As the aircraft stalled and went into a nose low attitude, LCDR Rainey reduced the PCL (power control lever) toward idle. As she was rolling toward wings level, she advanced the PCL to maximum to stop the loss of altitude but due to the 2 to 4 second lag in engine response, the aircraft impacted the ground before power was available.

6. Although the above sequence of events is the most likely to have occurred, it does not change the possibility that a "rollback" did occur.

7. The most probable cause of the accident was the pilots failure to maintain proper interval.

8. There are many items that are considered as possible contributing factors to the accident. They are listed as follows:

a. The design of the aircraft which limits forward visability when in a climb.

b. The performance of the engine from idle to max power and the associated lag.

c. The relative size of the individuals, ENS Knowlton's size and strength could enable him to overpower LCDR Rainey in a panic situation.

d. The possibility that an LPA (life preserver assembly) was inflated at a critical time.

e. The inability of early stage students to trim correctly.

9. The Middleton Crash Crew and the RDO (Runway Duty Officer) acted in a very professional manner.

RECOMMENDATIONS

1. That the claim of Mr. William W. Ward be honored.

2. That a flight for the NATOPS syllabus be designed to familiarize all pilots with the different type stalls that may be encountered.

3. That landing lights be used in the landing pattern to enhance visibility of aircraft established downwind.

4. That every effort be made to incorporate Aircraft Technical Directive No. T-34C-0147 at the earliest possible date.

/s/ W. C. Morgan, Jr.
W. C. MORGAN, JR.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN C. RAINEY, Individually
and as Personal Representative of
the Estate of BARBARA A. RAINEY,

Plaintiff,

v. PCA 83-4084

BEECH AIRCRAFT CORPORATION, et al.,

Defendants.

AMENDED COMPLAINT

The plaintiff files this his Amended Complaint previously filed herein as to paragraphs 11, 13 and 23, as follows:

JURISDICTIONAL ALLEGATIONS

1. This is an action for damages in excess of $10,000.00 against defendants who are each foreign corporations. Jurisdiction of this case arises under 28 U.S.C. 1332(a)(2).

2. The plaintiff, a resident of Escambia County, Florida, is the duly appointed personal representative of the estate of his deceased wife, Barbara A. Rainey, and brings this action on behalf of himself, the estate of decedent, and the decedent's minor children Cynthia Rainey and Katharine Rainey.

3. On July 13, 1982, Barbara A. Rainey, a resident of Escambia County, Florida, was employed as an instructor pilot for the U.S. Navy, stationed at NAS Whiting Field, Milton, Santa Rosa County, Florida.

4. Defendant, Beech Aircraft Corporation (Beech), is a Delaware corporation engaged, at all times material to this Amended Complaint, in the business of manufacturing T-34C Turbo Mentor Aircraft, which were sold by it to the U.S. Navy to serve as a flight training aircraft at NAS Whiting Field. As is more particularly alleged hereinafter, defendant Beech did manufacture and sell this aircraft which, while being used in the ordinary course of its intended use in and around Florida, and which, while being used in its ordinary course of trade, use or consumption in Florida, resulted in death to the decedent. This Court has jurisdiction over Beech pursuant to the provisions of Section 48.193, Florida Statutes, 28 U.S.C. 1332 (a)(2), and Rule 4(e), Fed.R.Civ.P.

5. Defendant, Beech Aerospace Services, Inc. (BASI), is a Kansas corporation, which is in the business of servicing, maintaining and repairing the Beech T-34C aircraft for the U.S. Navy, at NAS Whiting Field, Milton, Florida. Thus, it carries on a business venture in this state and has an office in this state. At all times material to the allegations contained in this Amended Complaint, BASI maintained, repaired and serviced the Beech aircraft that were operated at NAS Whiting Field and more specifically, the T-34C aircraft in which decedent was killed. This Court has jurisdiction of BASI under Section 48.193(1)(a)(b), Florida Statutes, 28 U.S.C. 1332(a)(2), and Rule 4(e), Fed.R.Civ.P.

6. Defendant, Pratt & Whitney Canada, Inc. (Pratt-Whitney), manufactured the engine which was incorporated into the Beech T-34C aircraft in which decedent was killed. This engine was used in the ordinary course of

trade, use or consumption in Florida, and the Court has jurisdiction over Pratt-Whitney under Section 28.193(1)(a)(b), Florida Statutes, 28 U.S.C. 1332(a)(2), and Rule 4(e), Fed.R.Civ.P.

COUNT I—STRICT LIABILITY AGAINST BEECH AND PRATT-WHITNEY

7. The plaintiff incorporates and re-alleges all allegations of paragraphs 1 through 6 of the Amended Complaint.

8. Sometime prior to 1978, the defendant Beech manufactured the T-34C Turbo Mentor Aircraft, Navy BUNO 160955.

9. This aircraft was equipped with a turbine engine which was manufactured by Pratt-Whitney.

10. Defendant Beech sold this aircraft to the U.S. Navy on or about September or October of 1978 to be used in pilot training at NAS Whiting Field, Milton, Florida.

11. The aircraft and engine were equipped with a pneumatic fuel control system which was defective in its design and/or manufacture in that it was prone to malfunction in such as way as to cause "power interruptions" ("power interruptions" as used herein includes the following: engine tends towards minimum flow; reduction to minimum flow; engine failure to respond to PCL movement; power interruption; reduction to low power; failure of engine to increase power; engine RPM hanging at low RPM or power; engine hangs on start; power reduction; engine power response problem; failure of pneumatic side of fuel control; and engine rollback.) such that the pilot

of the subject aircraft was unable to sustain sufficient power to maintain flight. Engine power interruptions had, for several years prior to the decedent's accident on July 13th, 1982, been experienced by the Naval Air Training Command.

12. This defect is one which existed at the time the aircraft and engine left the hands of Beech and Pratt-Whitney, and rendered the aircraft unreasonably dangerous to the user.

13. On or about July 13, 1982, Barbara A. Rainey was issued a T-34C aircraft BUNO 160955 (955) by BASI, for a flight originating from and returning to NAS Whiting Field. During a training "touch-and-go" exercise, as a result of the defect alleged herein, the decedent's aircraft encountered a power interruption and crashed. At the time of the accident the aircraft was being used for its intended purpose by the decedent.

14. As a result of the defective fuel control system of the engine manufactured by defendant Pratt-Whitney, and incorporated into the aircraft manufactured by defendant Beech, the decedent Barbara A. Rainey was killed. By reason of her death, her surviving spouse and two children have suffered and will continue to suffer extreme mental and emotional pain and suffering, and they have been deprived of her comfort, society, protection, guidance, training, companionship, support and services. In addition, her estate has incurred funeral bills.

WHEREFORE, plaintiff prays for a judgment for damages against Beech and Pratt-Whitney, and prays for a trial by jury as to all issues so triable.

COUNT II—NEGLIGENCE OF DEFENDANTS BEECH AND PRATT-WHITNEY

15. The plaintiff re-alleges and incorporates herein by reference paragraphs 1 through 14 of the Amended Complaint.

16. Defendant Beech Aircraft, in designing and manufacturing the aircraft as alleged in Count I, was negligent in that it knew or should have known that the aircraft was defective in the respect set forth in paragraph 11 of the Complaint and that this defect would expose, to those persons using the aircraft for the purpose for which it was intended, an unreasonable risk of harm.

17. Defendant Pratt-Whitney, in designing and manufacturing the engine as alleged in Count I, was negligent in that it knew or should have known that the engine was defective in the respect set forth in paragraph 11 of the Complaint and that this defect would expose, to those persons using the aircraft for the purpose for which it was intended, an unreasonable risk of harm.

18. As a result of the negligence of the defendants Beech and Pratt-Whitney, the decedent Barbara A. Rainey was killed. By reason of her death, her surviving spouse and two minor children have suffered and will continue to suffer extreme mental and emotional pain and suffering, and they have been deprived of her comfort, society, protection, guidance, training, companionship, support and services. In addition, her estate has incurred funeral bills.

WHEREFORE, plaintiff demands judgment for damages against Beech and Pratt-Whitney, and a trial by jury.

COUNT III—NEGLIGENCE OF BEECH AEROSPACE SERVICES, INC.

19. The allegations of paragraphs 1 through 18 are incorporated and re-alleged.

20. Defendant BASI had a duty to maintain, service and repair the subject T-34C aircraft, and it had a duty to assure that it was at all times mechanically safe for the flight. On July 13, 1982, BASI issued to decedent aircraft BUNO 160955 when it knew or should have known there was a defect in the fuel control system of this aircraft, as described in paragraph 11. This defect rendered it unreasonably dangerous to those persons using the aircraft. BASI thereby negligently exposed the decedent to a foreseeable risk of serious bodily harm or death.

21. As a result of the negligence of the defendant BASI, the decedent Barbara A. Rainey was killed. By reason of her death, her surviving spouse and two minor children have suffered and will continue to suffer extreme mental and emotional pain and suffering, and they have been deprived of her comfort, society, protection, guidance, training, companionship, support and services. In addition, her estate has incurred funeral bills.

WHEREFORE, plaintiff demands judgment for damages, and a trial by jury.

COUNT IV—PUNITIVE DAMAGES

22. The plaintiff re-alleges and incorporates herein by reference paragraphs 1 through 21 of the Amended Complaint.

23. At all times material to the allegations herein, the conduct of the defendants Beech, Pratt-Whitney and

BASI was in reckless disregard for the safety of decedent and other persons who they knew would fly the aircraft. The defendants knew that the aircraft was defective and unreasonably dangerous as alleged in paragraph 11 in the Amended Complaint, and the defect was known for several years prior to decedent's death. That is, the T-34C turbo jet engine was, for several years prior to July 13th, 1982, known to encounter "power interruptions" often for reasons never explained or discerned by the defendants. They were aware that a manual fuel control system was needed and available for this particular aircraft and they recklessly did not include such control either on the date of manufacture or sale, or at some other time in advance of the decedent's death. The defendant's manufacture, distribution and sale of said engine and aircraft without the manual fuel control, or without later redesigning and retrofitting the product to correct the defect or override it, amounted to a conscious indifference to the safety of the decedent and others who might be harmed by the product. The conduct of BASI in certifying the decedent's aircraft safe for flight, with knowledge of the foregoing, and with firsthand knowledge of prior and numerous complaints of engine rollbacks in T-34C aircraft, amounted also to a conscious indifference to the safety of the decedent and others who might be harmed by the product.

WHEREFORE, plaintiff demands a judgment for punitive damages, against defendants Beech, Pratt-Whitney and BASI, and a trial by jury as to all issues so triable.

(Certificate omitted)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. PCA 83-4084

(Caption omitted)

ANSWER

The Defendants, BEECH AIRCRAFT CORPORATION, a Delaware corporation, (hereafter BEECH), and BEECH AEROSPACE SERVICES, INCORPORATED, a Kansas corporation, (hereafter BASI), for answer to the original complaint filed in the above styled cause, say seriatum:

They have no knowledge of the Plaintiff's status as called out in the preamble to the complaint and, accordingly, denying the same pending discovery.

JURISDICTIONAL ALLEGATIONS

1. The first sentence is denied. The second sentence is admitted.

2. Unknown and denied pending discovery.

3. Unknown and denied pending discovery.

4. BEECH admits that it manufactured certain aircraft including a model commonly called T-34C. The balance of paragraph 4 is denied.

5. BASI admits that it does some service and maintenance repair work on Navy aircraft including the T-34C model. The balance of paragraph 5 is denied.

6. The T-34C aircraft is powered by a Pratt and Whitney engine. To the best of these Defendants' knowledge, the downed aircraft had such an engine. The balance of paragraph 6 is denied.

COUNT I

7. Denied, except as admitted in paragraphs 1 through 6 above.

8. BEECH admits that it manufactured aircraft similar to the one described in the complaint. The balance of paragraph 8 is denied.

9. These Defendants admit that the engine of the downed aircraft was manufactured by PRATT AND WHITNEY, otherwise paragraph 9 is denied.

10. The subject aircraft was sold to an arm of the United States Government, otherwise said paragraph is denied.

11. Denied.

12. Denied.

13. Unknown and denied.

14. Denied.

COUNT II

15. Denied.

16. Denied.

17. Unknown and denied.

18. Denied.

COUNT III

19. Denied.

20. Denied.

21. Denied.

COUNT IV

22. Denied.

23. Denied.

FURTHER ANSWERING

24. The Defendants, BEECH and BASI, and each of them, say they are not guilty.

25. All allegations of negligence, breach of duty, proximate cause, legal cause, warranty, expressed or implied, strict liability, defects, unreasonableness, wantonness, recklessness, indifference, injury and damage are denied.

26. All parts, portions, counts and allegations of the complaint not specifically admitted are denied.

27. The Plaintiff's decedent knowingly assumed the risks, if any there were, in flying the described aircraft under existing conditions at the time and place of the subject accident.

28. The Plaintiff's decedent as pilot in command of the subject aircraft was negligent and careless in the operation/piloting of the aircraft in question at the time and place of the accident and prior to the actual occurrence of the accident. By reason of such neglect, carelessness and negligence on the part of the instructor pilot/pilot in command, she cause or contributed to the happening of the accident. In consequence of such conduct, Plaintiff's claim is barred in law or, in the alternative, such claim

is diminished under the doctrine of comparative negligence and in accordance with the degree or percentage of negligence which shall be ascribed to such pilot in command.

29. Defendants reallege and reaver paragraph 28 above and additionally aver that at all times material the pilot(s) of the subject aircraft failed to follow and/or violated applicable FARs and/or documented and recognized procedures for the handling and maneuvering of the subject aircraft in flight, under existing circumstances then at hand.

30. The subject aircraft and controls were negligently entrusted to an unskilled pilot prior to and at the time of the subject accident.

31. The subject aircraft was misused in the circumstances just prior to crash.

32. The subject aircraft was abused in the circumstances just prior to the crash.

33. The subject aircraft was used at the time and place in question for purposes and in a manner for which it was neither designed nor intended.

34. The subject aircraft was fabricated, manufactured and certified in accordance with all applicable United States Government standards and specifications.

35. The instructor pilot and the student pilot failed to properly pre-flight the subject aircraft prior to departure on July 13, 1982, from NAS Whiting, Florida.

36. The instructor pilot and the student pilot were at all times material engaged in a joint venture. In the

premises, the negligence and carelessness of each is imputed to the other.

37. The Plaintiff's decedent violated established flight rules governing the flight of military aircraft and in doing so caused or contributed to the happening of the subject accident.

38. The happening of the accident in question was directly due to the negligence of the United States Navy.

39. These Defendants aver that the law of Alabama governs disposition of the matters and things in controversy in the above styled cause.

(Certificate omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

(Caption omitted)

ANSWER OF PRATT & WHITNEY CANADA, INC.

Pratt & Whitney Canada, Inc. answers the complaint and says:

1. It admits that this court has jurisdiction over the parties and the subject matter of this case.

2. Without knowledge.

3. Without knowledge.

4. Admitted.

5. Admitted.

6. Its name has been changed to Pratt & Whitney Canada, Inc. It admits the remaining allegations of this paragraph.

7. No answer required.

8. Admitted.

9. Admitted.

10. Admitted.

11. Denied.

12. Denied.

13. Without knowledge.

14. Denied.

15. No answer required.

16. Denied.

17. Denied.

18. Denied.

19. No answer required.

20. Without knowledge.

21. Denied.

22. No answer required.

23. Denied.

(Certificate omitted)

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN C. RAINEY, Individually
and as Personal Representative
of the Estate of BARBARA A.
RAINEY,

Plaintiff,

vs. PCA 83-4084 WEA

BEECH AIRCRAFT
CORPORATION, et al.,

Defendants.

_____/

RONDI M. KNOWLTON, Individually
and as Personal Representative of
the Estate of DONALD BRUCE
KNOWLTON,

Plaintiff,

vs. PCA 83-4085 WEA

BEECH AIRCRAFT
CORPORATION, et al.,

Defendants.

_____/

PRETRIAL ORDER

(Filed March 20, 1984)

All matters incorporated in the pretrial stipulation will be made a part of the pretrial order, except to the extent such may be altered, amended or changed at the pretrial conference.

1. There was brought on for discussion at hearing the motion for summary judgment filed by Beech Aircraft Corporation. In connection with the motion Beech, citing *McKay v. Rockwell*, 702 F.2d 444 (1983), contended that, under the test there announced, there was shown that Beech came within those tests so that it was entitled to assert in this case a government contractor defense. The plaintiff oppose on two grounds. One was the ground that the underlying facts, as discussed and brought to light at this hearing, did not show that there was no genuine issue as to any material fact if in this case the *McKay* test were applied.

The other ground of opposition by the plaintiff was that, in any event, the *McKay* doctrine should not be applied and was not the law in Fifth Circuit or in Florida so that such was another reason why the motion should be denied.

The court concluded that, respecting the *McKay* test, there were genuine issues of material fact so that the motion for summary judgment should be denied, under the application of the factors. Since it finds that it must be denied, even if those factors were applied, it does not find it necessary at this time to make determination respecting the plaintiff's second contention.

2. Beech's motion to consolidate (Rainey PCA 83-4084) this case with the companion case of Knowlton, PCA 83-4085 is granted, the parties at the hearing agreeing that such motion for consolidation should be granted. The two cases are consolidated for all purposes including consolidation for trial.

3. Respecting the first issue of law concerning strict liability in the *West Caterpillar* case, no ruling at this time is made upon it. It was pointed out to the court at hearing that, under the *West* case, the court has said strict liability should be imposed only when a product to be manufactured is placed on the market knowing that it is to be used without inspection for defects and proves to have a defect that causes injury. There were cited to the court at the hearing the subsequent Court of Appeals case of *Harden v. Montgomery*, 85 S.2d 331, in which some distinction in that language apparently was made.

This issue of law does not apply to the defendant BASI.

4. Respecting the legal issue of government contractor defense, at the pretrial hearing the court tentatively concludes that such defense will be available to the defendants Beech and Pratt-Whitney provided the facts adduced at trial support such a defense, and the *McKay* test is applied.

Respecting BASI the position taken at pretrial conference by plaintiffs was that they were not trying to hold this defendant liable on strict liability but only for negligence. This defendant contends that if it had a contract, and performed it according to that contract without being negligent, then there is no liability; that is an agreed principle of law at the pretrial conference. The sole issue regarding this defendant is whether it negligently performed the work and its negligence proximately resulted in injury.

In the foregoing statement respecting availability of this public contractor defense, the court does not at this

time foreclose, as it did not on the summary judgment ruling, the question whether in any event the *McKay* doctrine is applicable in this case.

5. Respecting the legal issue 7, that is to say whether the negligence of either occupant of aircraft is imputed to the other because of the joint venture doctrine, the court concludes at pretrial conference that the answer is no. Here the plane, on an authorized plane flight, had one officer of the Navy in charge of the plane and conducting a training program for a student who was also in the Navy, so that there could not have been, and was not, equal authority.

6. Respecting issue 6, concerning the question who are employees of defendants for purposes of punitive damages under the *Mercury Motors* decision in Florida the ruling of the court at pretrial conference is that *Mercury* has no application in this case since that case is not applicable to a products liability punitive damages case. In this case the plaintiffs assert that the manufacturers Beech and Pratt-Whitney placed a defective and dangerous product into the stream of commerce with willful disregard to safety. Under the law, as this court understands it, punitive damages could be sought under a proper factual situation with vicarious responsibility playing no part in determination.

7. Respecting issue No. 8, concerning prior or subsequent incidents as admissible, it is not disputed at pretrial conference that evidence respecting prior or subsequent incidents is admissible provided they meet the substantial similarity test that is involved.

At pretrial conference plaintiff did say that plaintiff wanted to present some evidence of the installation on this particular aircraft of a manual fuel control of emergency power line that was accomplished after this accident but that had been on the drawing boards and planned before the accident. This could only come under the rule for the purpose of showing the feasibility of precautionary measures. However, parties at the pretrial conference indicate that there is no issue that this was not feasible and would have been feasible at all times prior to the accident. If that is the situation that is presented at trial then the court believes that such evidence should probably be precluded on the ground that, even if relevant, it should not be admitted under Rule 403, Federal Rules of Evidence.

8. Respecting issue No. 9, @ pretrial conference the court concludes that the JAG report provide the criteria and the trustworthiness would be admissible but would be admissible only on its factual findings and would not be admissible insofar as any opinions or conclusions are concerned.

At pretrial conference, with the parties' agreement, the defendants who wish to present this matter into evidence will, within 10 days after date, provide the plaintiffs with excised portions of it they wish to present. If plaintiff is in disagreement, and the parties cannot reconcile their differences, then both parties will report any differences to this court with each party providing a memorandum in support of its respective position so that ruling may be made, if at all possible, in advance of trial.

9. The court concludes at pretrial conference, and so advised the parties, that this case would be bifurcated for

trial with liability first resolved and, if liability is found, with the issue of damages then to be resolved. If liability is found the same jury that considered liability will also be the jury that will consider the question of damages.

10. At pretrial conference the court was advised that portion of a videotape deposition taken did not come through on the tape although the verbal transcription was there so that a complete transcript is available. The defendants contend that, since part of this is missing for videotape purposes, it must be treated as an ordinary deposition with no part of the videotape used. The plaintiffs contend that they can use all of their videotape and go to the part where some is left out and read that into the record with the deposition then resumed where it comes back on the videotape.

The court's ruling at the pretrial conference is that in this regrettable situation, since the videotape deposition does not comply with the requirements of the rule, although through no fault of the parties, the defendants' objections to it are well taken. The court will entertain motion on the part of plaintiffs to retake this deposition by videotape should the plaintiffs wish to present it in that fashion and if such may be taken in time so as not to interfere with the trial of the case.

11. At pretrial conference, it being pointed out to the court that, as the pretrial stipulation points out, the parties have stipulated that the opinion testimony of retained experts previously deposed would be limited at trial to opinions expressed in the depositions as to which inquiry was made except as to those matters addressed in the deposition of Dr. Craig. At pretrial conference

this stipulation between the parties is approved by the court.

12. After date, and in no event later than two weeks before trial, the parties will endeavor to agree on the full and complete set of instructions to be given in this case with plaintiffs taking the initiative in that regard. Should the parties have any particular instruction on which they cannot agree then their differences will be reported to the court with a memorandum from each party in support of that party's position so that, to the extent feasible, such might be resolved in advance of trial.

The parties will also endeavor to agree on form of verdict.

13. This case is set for trial before the court, and with a jury, commencing at 9:30 a.m. on Monday, July 9, 1984, with estimated time of trial being two weeks.

14. The notes of the pretrial conference are designated as the pretrial order in each of these consolidated cases (Rainey, PCA 83-4084 and Knowlton, PCA 83-4085).

DONE AND ORDERED this 20th day of March, 1984.

/s/ Winston E. Arnow
WINSTON E. ARNOW,
Senior Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN C. Rainey, individually and
as Personal Representative of the
Estate of BARBARA A. RAINEY,

Plaintiff,

vs. Docket No. PCA 83-4084

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES,
INC., and PRATT AND WHITNEY
AIRCRAFT OF CANADA, LTD.,

Defendants.

_____/

RONDI M. KNOWLTON,
individually and as Personal
Representative of the Estate of
DONALD BRUCE KNOWLTON,

Plaintiff,

vs. Docket No. PCA 83-4085

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES,
INC., and PRATT AND WHITNEY
AIRCRAFT OF CANADA, LTD.,

Defendants.

_____/

Pensacola, Florida
July 10, 1984
2:00 o'Clock, P.M.

TRANSCRIPT OF PROCEEDINGS IN CHAMBERS
BEFORE THE HONORABLE WINSTON E. ARNOW
SUNCOAST REPORTING

Court Reporters
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(p. 3) The Court: At this hearing, it is the ruling of the Court that, notwithstanding the failure of compliance with the pre-trial order in some respects, that this Court should nevertheless allow the defendants to place in evidence before the Jury the findings of facts, 31 in number, that were in the JAG report. What was the date of it, September 1st?

Mr. Harrell: September 1st is stamped on it.

The Court: That's shown as Exhibit 266 in the file. It's stamped September 1st, 1982.

At this hearing, the Court also, in light of the authorities it has considered and pursuant to its discussion at this hearing, holds that the opinions attached to those 31 findings may also be admitted, to the extent that they are opinions and conclusions. In that connection, various matters in there would not be allowed in.

Paragraph five is nothing but a possible scenario, as it's called, and would not be allowed in. Paragraph eight talks about possible contributing factors and it would not be allowed in. Paragraph nine, which says somebody acted in a very professional manner, would not be allowed in because it is not relevant.

All of this is done over the objection of plaintiffs, whose objections are noted on the record as follows:

(p. 4) Mr. Partington. If it please the Court, the plaintiffs object to the order; first, on the basis that the specific regulation which provides for the JAG investigation requires the investigator to make separate findings of fact and opinions, and to carefully distinguish those; and that under the applicable law in the Fifth Circuit, which

is the *Smith* case, the Fifth Circuit very carefully delineated the difference between findings and evaluations and opinions in *Smith* versus *Ithica Corporation* at 612 F.2d 215, and specifically held that only factual findings—which meant just that, factual findings—could be admitted and that opinions and evaluations otherwise were not to be admitted, and that is the law of the Fifth Circuit.

We also object on the grounds that the plaintiffs—

The Court: To bolster that, that decision, at least, was passed at a time when there was not any precedent in the 11th Circuit. It was Fifth Circuit law, but it came at a time—it's precedent in the 11th Circuit. There was one of the cases that they cited that was a Fifth Circuit case that came on after the *Smith* case, and while it's informative, it's not binding because it came out after the proper date.

All that, I took into consideration in my ruling. I point that out for you.

Mr. Partington: I understand that. Also, the (p. 5) other basis, of course, is that the plaintiffs feel they have been unduly prejudiced by the failure of the defendants to comply with the pre-trial order and, in fact, to fully brief the matter for the pre-trial conference, and we object to any of the opinions.

In that connection, Judge, we would respectfully request that the Court allow the plaintiffs an opportunity, in light of its finding and ruling made at the time, to review the JAG report for purposes of anything we might consider that we might wish to offer that might go to the conclusions—

The Court: Go to the conclusions?

Mr. Partington: To the opinion, which the Court referred to, which is that the most probable cause was a failure to keep proper interval, and that we be given leave, in the event we so decide, to call as a witness such person or persons who might not have been called at this trial, but who could present evidence concerning that conclusion and the trustworthiness of it.

The Court: Do you want to be heard on that?

Mr. Womack: Beech has no objection to that procedure.

Mr. Toothman: We wouldn't object to this opportunity to—

The Court: Nobody around the table is objecting to it?

(p. 6) (No negative response was elicited.)

The Court: With no objections from the other parties, sir, you're given that permission.

Mr. Partington: We respectfully also believe that the Court should give an appropriate instruction concerning this, so that the jury does not give undue weight to it as opposed to any other item of evidence in this case.

The Court: I don't know what you mean by an appropriate instruction, but I'll be happy to consider any instruction you wish to prepare.

It comes along under the exceptions of the hearsay statement and evidence rule, if that's what you mean. That's the basis for its admission here.

Mr. Partington: I'm talking about the instruction that is usually given, which says that the jury is the sole trier of facts and it is required to make its own evaluations and conclusions—

The Court: Don, they will do that. If I do that, in fairness, every time some evidence comes in, I'd have to say, "Here, this evidence is admissible, but you're the one to determine whether or not it establishes facts." You don't just do that for part of the evidence.

Mr. Partington: Right.

The Court: I'll be willing to consider any instructions you prepare at the time.

(p. 7) Mr. Partington: Your Honor, we also have filed a motion in limine, particularly directed to two things. The defendants have indicated that it is their intent to call John Rainey and castigate him for attempting to get certain information into the JAG report and, thereby, to create some sort of an inference that he is guilty of wrongdoing, and there should be no reference to that because it was his right to work with the Judge Advocate General's office and those responsible for the investigation. They should be instructed that they are not to inquire into that matter. It is irrelevant and immaterial to the issues before this jury.

Mr. Toothman: May I respond to that, Your Honor?

The Court: Yes, sir.

Mr. Toothman: I'm not sure he has properly categorized our intent with regard to Lieutenant Commander Rainey. However, I will say this, Lieutenant Commander

Rainey wrote certain letters in which he expressed his opinion of what happened, after his investigation, and some of those are admissions against his interest.

The Court: How would it be an admission against his interests?

Mr. Toothman: Because he said his wife was upset, that she had been pressured, things of that nature, (p. 8) after his investigation.

Now, I have the right to ask that man, "After your investigation, sir, didn't you form the opinion that your wife had been pressured, she had tried to cancel the flight and wasn't allowed to do it, that she was upset, uncharacteristically heated?" That was his belief after his investigation and his statement—

The Court: Under what evidentiary rule does that come in?

Mr. Toothman: That comes in as an admission against interest.

The Court: Admission against interest that he had an opinion of some kind?

Mr. Toothman: Yes, those opinions are against his interests.

The Court: It might be against his interests, but it wouldn't provide any relevant evidence on his claim.

Mr. Toothman: Yes, sir, it would. It goes to her negligence. It goes to Mrs. Rainey's possible negligence.

The Court: His opinion about her state of mind is admissible to show that state of mind?

Mr. Toothman: Yes, sir. He's a party.

Mr. Gaines: We're talking about an admission, not an opinion, of somebody who conducted an investigation.

(p. 9) The Court: We're now talking about that he comes along and he had formed an opinion about the state of mind of his deceased wife.

Mr. Toothman: Absolutely.

The Court: And so we say that that is an admission against interest on his part, because it goes into an admission of the state of mind of his deceased wife. I don't know about that one. Does anybody want to show me law on it? I don't know.

Mr. Larry: Could I be heard on that, please?

The Court: It ought to be under the evidence rules.

Mr. Larry: May I be heard on that point?

The Court: Yes.

Mr. Larry: John Rainey was not even in Florida when she had this accident, so he has no personal knowledge of what her state of mind was. Any opinions he formed were pure speculation from talking to someone else, and he put together possible thoughts and scenarios and opinions, not based on any knowledge.

The Court: He's got a point. If he hadn't had a chance to talk with her—if he was testifying as to his own impressions about her, it would be something else, but if he's not doing that—

Mr. Toothman: Let me put it to you this way. (p. 10) It's a statement of her conduct, after investigation. It's

simply my position that if—let's forget it's an airplane. Let's say I hear my wife is in an automobile accident. I go home and ask everybody about it who witnessed it and I talk to them and come to the conclusion that my wife was upset and probably not handling the car very well, and I make such a statement and then I sue for her death. That statement is—I can be held to that statement.

The Court: I can understand a statement against interest would be in an automobile accident where, if I was the driver, and right after the accident, said, "My Lord, I was scared," I could see that. But when you come along to me and you tell me that you can come in here with a statement against interest by a representative who makes his statement based upon what he's gone around and seen and observed and assumed from some other people, and he now says that this was her state of mind—

Mr. Toothman: It's not a representative, it's him. He's the man that made the statement; he's the party.

Mr. Partington: Judge, we have two parties in this lawsuit, we have four children.

The Court: Who do we have?

Mr. Toothman: He's the personal representative—

Mr. Partington: He's the personal representative—

The Court: He sues for everybody else?

(p. 11) Mr. Toothman: Yes, sir. He's the personal representative.

Mr. Gaines: He's also a survivor. It just happens, Your Honor, that we had this point in an appeal a couple of years ago, in which Dick Warfield was attempting to

get in some statements made by a store manager who had no personal knowledge of the circumstances; and the cases, maybe a little bit surprisingly, hold that it doesn't make any difference whether he knows it or not. If it's a statement that he makes, it's an admission, no matter what his basis is for believing that is a fact. If he makes it as a factual statement—

The Court: That was in the Florida State Court, sir?

Mr. Gaines: There are cases throughout the country.

The Court: Somebody better give me some law on this thing.

Mr. Partington: Judge, what I'm saying is this, they are going to try to show that John Rainey tried to get the JAG investigation revised or changed, and I think that is improper, Judge.

Mr. Toothman: Your Honor, I have no such intent, and express it to the Court. I don't have any such intent.

(p. 12) The Court: I would think that was improper, too.

Mr. Toothman: I don't have any such intent. I merely want to hold that man to his statement of opinions.

Mr. Partington: Then there will be no, "Didn't you send this into the JAG office?"

Mr. Toothman: "I'll say did you write a letter.

Mr. Partington: I think we should take those as they come up.

Mr. Womack: We're not going to call Mr. Rainey until next week, if at all, so the Court will have some time—

The Court: Well, we don't know when he's going to put him on the stand. He might be his first witness, I don't know.

Mr. Womack: They told me they were not going to call him.

Mr. Harrell: They represented to us that they were not.

The Court: I know you're going to give me some law on this admission against interest thing.

On that other point, on the face of it, I couldn't see—the fact that he wrote letters and tried to get another investigation, I don't see how that has any relevance in this case whatsoever.

(p. 13) Mr. Toothman: I don't propose to show that. I'll hold the letter up to him. If he denies he said it, I'll say here it is.

Mr. Partington: The other point we want to bring out on these—

The Court: Do I need to make a note on these?

Mr. Larry: It's on the record.

The Court: On the question of Commander Rainey, the statements that he made in a letter, to the effect that his wife was upset and under pressure, the defendants wish to present this as an admission against interest. Before the Court the representation was made that he did this, not from any personal knowledge at all on his part, but from an investigation that he personally conducted with people, friends, and neighbors after his return.

The parties will provide the Court with a brief on this point, in time for it to consider and make a ruling before this gentleman testifies.

The point was also raised at this hearing, by the plaintiffs, that they were concerned that the defendants were going to try to bring out from this Commander that he had made a protest to the powers that be, concerning the investigation made and wanted another investigation made; is that what you're concerned about?

Mr. Partington: Yes.

(p. 14) The Court: The Court was assured at pretrial conference that the parties did not intend to pursue this kind of inquiry with him, and the Court agrees on the basis that such is irrelevant and would not be proper.

Mr. Womack: Just so the Court will be fully advised, Mrs. Knowlton also signed one of those letters—

The Court: How much of this do you want on the record?

Mr. Womack: It need not be on the record, as far as I'm concerned.

The Court: Let's just put rulings on the record.

(Discussion held off the record.)

The Court: Respecting a report called Mishap Report, the Navy or the powers that be, under the Freedom Act, would not give anyone access to it, and the Court is advised under a March of 1984 Supreme Court opinion, this Court's orders in the past requiring such to be done were wrong, so that they couldn't get the report.

There was apparently some testimony or evidence to the effect that one of these plaintiffs had been given an opportunity to read it or to use it.

It is the Court's ruling at this conference that unless the original of that report could be produced and found to qualify under the Rules of Evidence, nobody can (p. 15) use the report or a copy of it, and any reference to it would be improper, because there is nothing that is relevant about somebody having just seen it.

(Discussion held off the record.)

Mr. Harrell: When you were delineating which parts of the opinions were not to be included, you had previously indicated that it was a possibility on number six, but I believe when you were setting forth your discussion that she took down, you did not allude to paragraph six. I wanted to be sure that that was covered.

The Court: Paragraph six is not admissible.

Mr. Harrell: That's correct. That's all I wanted, Judge.

(Discussion held off the record.)

Mr. Gaines: I'd like to have the record show that the Court ruled at this hearing today that the plaintiffs would be permitted to introduce evidence showing discussions about the necessity for the design and the adoption of the design of an emergency power lever which was not installed until after this crash occurred, over the objection of the defendants that this constitutes a remedial action that occurred after the event.

The Court: The evidence is admissible if it ties into a defect in design. All of this is admissible only for the

purpose of showing that there was a defect in (p. 16) design that was in the plane when the plane was sold. It couldn't be admitted for any other purpose. A measure taken after an accident would not, by itself, be admissible. Is there any argument with you about that one?

Mr. Partington: No. I think Rule 407 is the one we're talking about is after the accident. They're simply trying to push that rule back to before the accident.

The Court: That would go out. But if this evidence points out, as I thought the pitch on it was, a defect that was in existence at the time the ship was sold or goes into a negligent condition existing in design at the time the said ship was sold, then it's admissible and he can come forward with it.

Mr. Gaines: And we do not have to make on the record all the objections to all these questions that are going to be asked of various witnesses—

The Court: You mean as far as relevance is concerned?

Mr. Gaines: As far as this point is concerned.

The Court: You would want to object at trial that this was not relevant.

Mr. Toothman: Irrelevant and a time predicate that—

The Court: I don't know on the objections on the time predicate. There might be other reasons why you (p. 17) want to object. As far as relevance is concerned, you need not make those on the record, if that's what you mean. There might be other things.

(Discussion held off the record.)

(The conference was adjourned at 4:30 p.m.)

(p. 18) CERTIFICATE OF REPORTER

Omitted

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NOS. 83-4084, 83-4085

(Title omitted in printing)

(TRIAL EXCERPT)

Rainey - Direct

(p. 5-60) JOHN C. RAINEY, DEFENDANTS' ADVERSE WITNESS, SWORN
DIRECT EXAMINATION

BY. MR. TOOTHMAN:

Q Good morning, Mr. Rainey.

A Good morning, sir.

Q Mr. Rainey, for simplification of address, as least when I was in the Navy, I think it was proper protocol, all officers below the rank of full commander were addressed as Mister. It that still done? Or Ms. or Mrs., depending on sex.

A It's a matter of interpretation. I am normally addressed as work as Commander Rainey, but since I'm here in a civilian capacity, Mister will be find.

Q When I'm referring to Mrs. Rainey, since there are two of you, I'll say Mr. and Mrs. so we'll know who we're talking about.

I want to cover a few points with you, sir. The first point I want to cover, Mr. Rainey, is the relationship of the instructor pilot to the student when you take a plane

up. In this case, Mrs. Rainey was the instructor pilot, was she not?

A Yes, sir.

Q And Mr. Knowlton was the student?

A Yes, sir.

Q Do you know whether or not Mrs. Rainey was the (p. 5-61) primary pilot for Mr. Knowlton; that is, the one that would be primarily responsible for him?

A It's my understanding that that changed. Initially, I understand that Ensign Knowlton had been assigned a different instructor who went on leave after two flights and following that instructor departing on leave, my wife was assigned as his primary instructor.

Q This would be the second flight where she had been his primary instructor?

A That's what I was told.

Q It was his fourth flight?

A As far as I know, yes, sir.

Q When you go out on an instructional flight, the student cannot sign out for the aircraft, can he?

A He can on a solo; he would not on a dual flight.

Q So Mrs. Rainey would have had to have signed out for the aircraft?

A Yes, sir.

Q She takes them out as her student for that particular flight?

A Yes, sir.

Q If she doesn't already know the young man in this case from prior experience or limited experience, it's her obligation to get to know him, emotionally, and get some grasp of his basic knowledge before she takes him up; (p. 5-62) isn't that so?

A It's so, within the limits that are available. Ordinarily, you would talk to them prior, possibly look over his training record, if it was available.

Q Ask him a few questions to see where his parameters of efficiency lay; wouldn't that be a routine thing to do?

A You might put it that way. I don't know that he would be an adequate judge of where his proficiency lay.

Q The purpose of my question is that Mrs. Rainey is supposed to ask the questions to find out where his proficiency level it?

A She might ask what he was having problems with on previous hops, sir.

Q Now they go out and get up in the airplane and they're on a flight. Isn't her obligation to overlook everything he does and monitor everything he does, as he does it, when he's in control?

A Yes, sir.

Q And isn't it her duty, if he's doing something wrong, to either correct it by telling him how to correct it or, if there's not enough time to tell him, to just do it herself, take control?

A Not necessarily. It depends on where that was taking place in the flight and what the instructional objective was.

(p. 5-63) Q Yes, sir, that's what I mean. It depends on how extreme the situation is. If there's enough time and energy and effort to be expended, she should teach him by telling him how to correct it; is that basically it?

A It depends, sir. You're getting into instructional technique, whether someone would interrupt a student at the point of error or let him—and destroy his train of thought or complete the manuever would be up to the instructor, however they chose to handle it.

Q But once the instructor decided that it's too late to tell him, not enough time to tell him, then she's to take control and do it herself, isn't she?

A Depending on what the error is, yes, sir.

Q I want to go to another subject now, sir. I want to get a brief resume of your experience as a pilot and hers. Let's start with you. You graduated from the Academy in '72, I believe?

A Yes, sir.

Q You went to flight training in March of '73; is that correct?

A Yes, sir.

Q Incidentally—Mrs. Rainey coincidentally started her flight training at the same time you did?

A Yes, sir, we were in the same beginning class.

Q She was a graduate of Whittier College with a (p. 5-64) Bachelor of Arts degree?

A Yes, sir.

Q You were both regular Navy at the time?

A Yes, sir.

Q You completed your flight training, both of you, in May of 1974?

A No, sir. My wife got her wings on the 22nd of February in '74; I got mine somewhere around the 15th or 16th of May, '74.

Q She finished a little ahead of you?

A Yes, sir.

Q Had she had prior flight training?

A No, sir.

Q In May of '74, you were assigned to a P3 training squadron or group at Moffett Field, California?

A That is correct.

Q And she also went to the same unit?

A No, sir. She went to her squadron at Alameda, VR-30, Fleet Logistics Transport Squadron 30 at Alameda, California.

Q You both went to California?

A Yes, sir, we both went to the Bay area.

Q From November '74 to '77, you were with Patrol Squadron 46?

A Yes, sir.

(p. 5-65) Q Flying what?

A P3 Bravos for the first two years and the last year we got P3 Charlie Updates.

Q And you wife was flying what?

A She flew C-1's, T-39's and I think the last year we were there she flew the DC-9.

Q In November of '77, you were reassigned back to Whiting Field—

A Yes, sir.

Q —here in Florida?

A Yes, sir.

Q Was this for the purpose of coming back as a pilot instructor?

A That's correct.

Q What did your wife do at that time?

A At that time, my wife resigned from active duty, became a civilian.

Q She resigned her regular commission and got a commission in the Reserves?

A Yes, sir.

The Court: When was this she did this?

The Witness: We came down here in November of '77.

The Court: At the time of this accident, you were not on active duty?

(p. 5-66) The Witness: Yes, sir, I was. This was a previous tour at Whiting.

The Court: Go ahead.

BY MR. TOOTHMAN:

Q When did you finish your obligated service that you were obligated as a graduate of the Naval Academy?

A My obligated service from the Naval Academy would have been five years after I graduated, so the 7th of June '77.

Q All right, sir. And in '78—you also resigned from the Naval services as a regular Naval officer and went to American Lines; is that correct?

A That's correct.

Q Now, with American Airlines, you were in the initial stages of crew training and you were there for a flight engineer, were you not?

A Yes, sir.

Q At all times with American Airlines, you were a flight engineer?

A That's correct.

Q And you now have a commitment to go back to American Airlines as a flight engineer?

A I have an option to go back as a flight engineer, yes, sir.

Q Then from '78 to '81, that's the period of time we're talking about with American Airlines?

(p. 5-67) A Yes, sir. Well, no. I actually started with American Airlines, I think, the 3rd of January '79, and was laid off by them in September, October of '81.

Q When you go laid off by American Airlines, you requested the Navy to come back on active duty in the Reserves?

A Yes, sir.

Q That's how you got back on active duty in 1981?

A That's correct.

Q And in 1981 when you came back, you came to Whiting Field as an instructor pilot?

A Yes, sir.

Q That's what you had been when you left the Navy?

A That's correct.

Q Now, Mrs. Rainey came back into the Navy as a Reserve officer on active duty at what time?

A The same time I did.

Q So you both came back upon request for active duty in 1981?

A Yes, sir.

Q Both came back as instructor pilots?

A Yes, sir.

Q Now, instructor pilot is a normal—rather normal assignment in the routine of a Naval Aviator?

A Not necessarily. It's a possibility. It's an option (p. 5-68) you could choose or the Navy could assign you to for shore duty. It's one of a number of options.

Q All right, sir. Now let's talk about the—the next subject I want to address is the command arrangement

here that you and Mrs. Rainey were in. At Whiting, you were both in Training Wing Five; is that correct?

A That's correct.

Q Training Wing Five was skippered by Captain Jack Smith?

A That's correct.

Q And under Training Wing Five, there were three training squadrons; is that right?

A There are five training squadrons. There were three fixed wings and two helicopter.

Q I'm sorry. Three fixed wing training squadrons?

A Yes, sir.

Q That's two helicopter and three fixed wing?

A That's correct.

Q Mrs. Rainey was assigned to Squadron Three?

A Yes, sir.

Q And at all times we're talking about here, she was in Squadron Three; is that right?

A That's correct.

Q You were assigned to Squadron Two?

A Correct.

(p. 5-69) Q And at all times through the accident, you were in Squadron Two?

A Yes, sir.

Q Mrs. Rainey, in Squadron Three, has as her skipper Lieutenant Colonel Habermacher of the Marine Corps?

A In the latter half of the time she was in the squadron. Initially she had Commander John Healy and he was relieved in May of '82.

Q At the time of the accident, her skipper was Lieutenant Colonel Habermacher?

A That's correct.

Q Now, also in her squadron was Lieutenant Blake, was there not?

A There—Lieutenant Commander Blake was in her squadron. I don't know if there was a Lieutenant Blake.

Q I'm sorry, I meant Lieutenant Commander Blake. I'm sorry.

A Yes, sir.

Q Now, on the day of the accident, Blake was in the pattern, he was one of these planes in the pattern, wasn't he?

A That's what I've been told, yes, sir.

Q Lieutenant Colonel Habermacher was one of them in the pattern?

A I was told that. I was not there.

(p. 5-70) The Court: You are going into matters that he doesn't know directly himself. I don't know why you're going into it this way.

Mr. Toothman: He has stated in his letter—

The Court: Yes, but it comes from something he was told.

Mr. Toothman: Well, it's an admission. I'll tie it up.

The Court: Go ahead, sir.

BY MR. TOOTHMAN:

Q In your squadron, you have, in addition to yourself, Lieutenant Hanzell?

A Yes, sir.

Q Lieutenant Kolakowski?

A Yes, sir.

Q And Captain Guthrie; they were in your squadron?

A They were in my squadron, yes, sir.

Q You were senior in rank to all three of them, were you not?

A That's correct.

Q I'm finished with that aspect of my questioning. The next aspect has to do with a few questions about Lieutenant Kolakowski.

After the accident, as some period either in late '82 or early '83, in your squadron, Lieutenant (p. 5-71) Kolakowski came under your direct command, did he not?

A Command? He worked for me. I don't know if I'd call it command.

Q All right. He was one of the officers working directly under you in the carrying out of your duties?

A Yes, sir.

Q In February or March of 1983, you had this lawsuit pending, did you not?

A Define pending, sir.

Q Well, it had been filed and it was moving along.

A February or March of '83, sir?

Q Of '83.

A I don't believe so, sir.

Q Was it that you were thinking about it, then?

A I was thinking about it. I don't think it had been filed.

Q Let's say you were thinking about it.

A Yes, sir.

Q In February or March of '83, as one of your duties in the supervision of Lieutenant Kolakowski, you filled out his fitness report, did you not?

A I filled out a rough fitness report that I submitted to the operations officer, who then sent it to the commanding officer. The commanding officer is the one who does fitness reports on all officers.

(p. 5-72) Q The skipper signs the fitness report on every officer in his unit, does he not?

A Yes, sir.

Q However, he delegates to those under him, certain officers, the responsibility of giving to him a suggested draft of a fitness report for his signature?

A That's correct.

Q Insofar as Lieutenant Kolakowski, you were the one designated to submit the fitness report on Lieutenant Kolakowski?

A I submitted the initial draft, yes, sir.

Q And about three months after that, Lieutenant Kolakowski gave his deposition in this case, didn't he?

A I don't know the date of his deposition, sir.

Q I want you to assume, sir, that Lieutenant Kolakowski was deposed on June the 27th of 1983, at Milton, Florida.

A Okay.

Q That's the date.

A Yes, sir.

Q You sat through that deposition, didn't you?

A Yes, sir, I was there.

Q And at that time, you were stationed out at NAS Pensacola weren't you?

A That's correct.

Q Incidentally, you gave Lieutenant Kolakowski a (p. 5-73) good fitness report, didn't you?

A Yes, sir. He was a good officer.

Q I want to go to another subject, please, sir. Your relationship with Captain Guthrie. You have agreed that Captain Guthrie was in your squadron?

A Yes, sir, he was.

Q You will agree that this accident happened on July the 13th, 1982?

A Yes, sir.

Q Now, you've heard your skipper, Commander Shields, on tape here, videotape, say that he went flying with you; remember? Remember that testimony of Commander Shields?

A Yes, sir.

Q That flight with you took place on August 2nd of 1982, did it not?

A I don't know. I'd have to check my log book. If you're looking it up, I will take your word for it, sir.

Q I'll give you something quicker.

The Court: Can you speak up a little bit louder? I believe they're having a little trouble hearing you over there.

The Witness: Yes, sir.

BY MR. TOOTHMAN:

Q Do you have a log book or would you want to read your (p. 5-74) deposition to get that date?

A I do not have a log book with me. There is a log book at NAS Pensacola that documents when I flew.

Mr. Toothman: Can we stipulate it was August 2nd?

Mr. Larry: Sure.

BY MR. TOOTHMAN:

Q It's stipulated—

A Yes, sir, that's fine.

Q Now on August 2nd when you took that flight with your skipper, Commander Shields, Commander Shields said on his deposition that he had read the written—initial written statement given by Captain Guthrie and that it didn't provide any light on what might have happened.

Commander Shields also said, "I understand he later amended it." Now, Mr. Hall, when he testified yesterday, said that he had seen both statements of Guthrie's.

Mr. Larry: Your Honor, I don't believe that's correct. I object to that testimony by Mr. Toothman. I believe he said he saw one statement and one desposition.

The Court: I don't recall what it was, either.

Mr. Toothman: I'll rely on the jury's recollection.

BY MR. TOOTHMAN:

Q My question to you, sir, is did you see both statements?

(p. 5-75) A I only saw one statement, sir.

Q That was the second statement?

A It's the only one I saw.

Q Well, it was the second statement—

The Court: Do you know whether it was the first or second statement that you saw?

The Witness: I saw a statement.

The Court: You saw a statement?

The Witness: I don't know if it was the first or the second one.

BY MR. TOOTHMAN:

Q All right, sir. Let's see if we can figure out if it was the first or second one. Commander Shields saw the first one prior to August 2nd—

THE COURT: Are you asking him whether he—

Mr. Curtis: Your Honor, he has no evidence—he doesn't know if there were two and there's no evidence before the Court that there were two.

The Court: Of course not. I don't know how he would know when Commander Shields saw it. Have you got the statement? If you've got a copy of the statement, show it to him and see if that was the one he saw. Will that get to it, Mr. Toothman?

Mr. Toothman: I've got the second one.

The Court: Is that the one you think he saw?

(p. 5-76) Mr. Toothman: Yes.

The Court: Well, show it to him and see if that was the one he saw.

(Document handed to witness.)

The Witness: That is the statement that I saw.

Mr. Toothman: Tell the jury the date on the statement.

The Witness: 24 September 1982.

The Court: Is this the statement that you saw, sir?

The Witness: Yes, sir.

The Court: All right. Go ahead.

BY MR. TOOTHMAN:

Q All right, sir. So that after the Shields' flight, this statement was made; isn't that true, sir?

A That's correct, yes, sir.

Q And you were present when this statement was made, weren't you?

A He wrote that statement in my presence, yes, sir.

Q And you found it so important that you helped him carry it over and give it to Commander Morgan, didn't you?

A. That is correct.

Q And this is the statement that talks about closing distances, isn't it?

(p. 5-77) A Again, that's the only statement I have seen. Yes, that does talk about the closing distances.

Q And in between those times, you have talked to—in between the time of the accident and the time of this statement on September 24th, you had talked to Captain Guthrie several times, had you not?

A That is correct.

Q All right, sir. Next subject. This has to do with a letter you wrote. It is undated and I would like to establish a date with you.

You wrote a letter to Lieutenant Commander Morgan who was—do you know who Lieutenant Commander Morgan is?

A Yes, sir.

Q His squadron is what squadron?

A VT-3.

Q That is your squadron?

A No, sir.

Q You wrote a letter to him which was undated, wherein you recited what you believed to be certain facts about the accident; isn't that so?

A I believe it's more correct to say I cited things that I had been told about the accident. I was not there, so I don't know facts about it.

Q You adopted them as your statements, didn't you?

(p. 5-78) A I wrote that letter, yes, sir.

Q I want to get the date of that letter. Do you remember the date of that letter?

A No, sir, I do not.

Q Do you remember that you attached to your letter a statement from Ensign Arnett?

A To one of my letters, yes, sir, I did.

Q All right, sir. I'll show the letter.

(Handing document to witness.)

Q This is your letter. You enclosed a statement of Ensign Arnett?

A Yes, sir.

Q The statement of Ensign Arnett is dated December, is it not?

A I'll have to check.

Q It's hard to read, but I think that's what it is.

A Where are you?

Q Up at the top.

A I can't really read that. I'll take your word that it's December.

Q Did you send that letter in shortly after you got that statement from Ensign Arnett?

A Fairly shortly thereafter, I would assume, yes, sir.

Q All right, sir. So then for the purposes of my questions, can we agree that this letter was written the (p. 5-79) end of 1982 or early '83?

A Yes, sir.

Q I think maybe you better have this letter to look at when I ask you my next questions.

A Yes, sir.

Q Now, by this time, by the time you've written this letter, you have talked to Lieutenant Kolakowski, Lieutenant Colonel Habermacher, Ensign Arnett, and Captain Guthrie several times, Hanzell, who was a friend of yours, and Colley? You discussed this case with all of them, hadn't you?

A I had not discussed the case with Ensign Arnett.

Q Let me just check something here, sir. You talked with Ensign Arnett before he left for Corpus Christi. When did he do that?

A The date that he made this statement, I asked him was he there and would he be willing to make a statement. I did not discuss what he saw or what his testimony would be.

Q All right, sir. Please refer to the letter.

A Yes, sir.

Q Paragraph two, did you not state that Lieutenant Commander Rainey attempted to cancel the flight at approximately 0840?

A That is what I was told.

(p. 5-80) Q That's what you said?

A That's what I wrote, yes, sir.

Q Now, at the time of 0840 when she attempted to cancel the flight, her request was denied, was it not?

A Personally, I do not know that. That's what I was told.

Q Yes, sir. All these things, you weren't there?

A That's right.

Q But you talked to all these people and you put these down as facts, didn't you?

A No, sir, I did not put them down as facts.

Q You didn't qualify them in any way, did you?

A I stated in the last paragraph that I submit the above for consideration, in order to present aspects that may not have been covered. I don't know that I presented them as being factual.

The Court: Didn't you submit it because you believed them to be true?

The Witness: I had been told them, sir.

The Court: Let me ask you this question. Unless you believed them to be true, would you have submitted them?

The Witness: No, sir, I would not.

The Court: Then would it be fair to say that you submitted this because while you had been told these (p. 5-81) things, you believed them to be true?

The Witness: Yes, sir.

The Court: Go ahead, Mr. Toothman.

BY MR. TOOTHMAN:

Q When this request to cancel the flight at 0840 was denied to Mrs. Rainey, she reacted in an uncharacteristically heated and disgusted manner, didn't she?

A Did I say heated?

Q That's the way—my thing is a little blurred. It's the top of page two of your letter, first line.

A I can't read that.

Q All right, sir. You can read uncharacteristically something and disgusted manner, can't you?

A Yes, sir.

Q Now, isn't it true, sir, that you put forth the reasons she tried to cancel this flight was that Ensign Knowlton had been up since 4:30 that morning, as one of the reasons?

A Yes, sir.

Q And that they had had one airplane cancel and that they had to wait for this second airplane, and that Ensign Knowlton had an examination at 12:00 that he had to get back for and they were pushed for time?

A Yes, sir.

Q That Ensign Knowlton was tired and emotionally (p. 5-82) drained.

A I think he said he could possibly have been, yes, sir.

Q The first line of paragraph C, page two, that they had been exerted to unnecessary pressure, the two of them?

A I don't know that I said the two of them.

Q Well, someone was put under unnecessary pressure?

A Yes, sir, that's what I said.

Q All right. Now, go—and one more question for you, sir, maybe two. Lawyers say one and there's always three.

Go to page four of your letter, paragraph E, second half of the paragraph. Now, in this paragraph, you referred to two airplanes, 955—can we agree that that's Mrs. Rainey's airplane?

A Yes, sir.

Q And you referred to airplane number 644. Can we agree that that's Lieutenant Colonel Habermacher's airplane?

A Yes, sir.

Q Didn't you say, sir, that after Mrs. Rainey's airplane rolled wings level, that Lieutenant Colonel Habermacher's plane came into view unexpectedly at its closest point of approach, although sufficient separation still existed between the aircraft. However, the unexpected proximitely of Colonel Habermacher's plane caused one of (p. 5-83) the aircrew in Mrs. Rainey's plane to react instinctively and abruptly by initiating a hard right turn away from Colonel Habermacher's airplane?

A That's what I said, based on the information I had at that time, yes, sir.

Q And this is late December '82, early January '83, we agreed.

A Yes, sir.

Q Now, later on, you and Mrs.—you and Mrs. Knowlton both wrote a letter adopting that same point of view, didn't you?

A It's not fair to say that Mrs. Knowlton wrote the letter. I wrote the letter and submitted it to her for her approval.

Q And she signed it?

A Yes, sir.

Mr. Toothman: Thank you.

The Court: Who's next? Do any of the rest of you wish to put this witness under direct?

Mr. Harrell: I have no questions.

Mr. Gaines: No questions, Your Honor.

The Court: You may proceed with cross-examination.

CROSS-EXAMINATION

BY MR. LARRY:

Q John, the inference that Mr. Toothman tried to draw (p. 5-84) from you was that you influenced the testimony of Captain Guthrie and Ensign Arnett and Lieutenant Kolakowski. Did you do that with any one of these witnesses?

A No, sir. I—

Mr. Toothman: I object to any of his motivations for these witnesses.

The Court: You went into his knowledge of them and so forth. I assumed you were trying to establish some basis for possible bias. The objection is overruled. You opened that door a little bit.

BY MR. LARRY:

Q Did you answer the question, John?

A No, sir, I did not make any attempt to influence their statements.

Q Has Captain Guthrie ever given any statement that you know of that was in anywise inconsistent with the taped deposition that was presented here in this courtroom?

A Not that I know of, no, sir.

Q Now, sir, in your letter to Commander Morgan, when you stated that there was an assumption about a hard right turn, was there some reason why you and Commander Shields flew that maneuver three weeks after the crash?

A Yes, sir. That was based on the information that we had directly after the accident.

Q And what was your experience? Was it the same as (p. 5-85) Commander Shields related to this jury, that the aircraft would not stall with power on; was that your experience?

A Yes, sir. In all of the evolutions that we tested, regimes that we tried, the airplane would not stall with full power available.

Q One last point. In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably primary cause of this mishap was rollback?

Mr. Toothman: I would object to this, Your Honor. Probable cause is an opinion.

The Court: I beg your pardon?

Mr. Toothman: He's trying to get an opinion out of him now, not a fact.

The Court: Objection sustained.

Mr. Larry: Your Honor, he has had the ability—

Mr. Toothman: I object to him arguing.

Mr. Larry: May I be heard on this?

The Court: Yes, sir. Go ahead.

Mr. Larry: On the basis that this letter constitutes an admission by Commander Rainey, he has been asked to answer every single question Mr. Toothman had respecting—

(p. 5-86) The Court: I don't recall going into anything except the matter about that right turn and so forth, and that's all he went into. He did express that opinion and that came in as an admission against him, I suppose, but that doesn't mean you can qualify him for the questions you are now asking. The objection is sustained.

Mr. Larry: No further questions.

Mr. Toothman: Just one redirect.

REDIRECT EXAMINATION

BY MR. TOOTHMAN:

Q You were asked by counsel if the taped deposition was the same as the statement taken. Now, it was the same as the statement of September, was it not?

A Could you clarify what you're asking? The deposition—obviously the text of the deposition is not verbatim from what the statement says.

Q But it talks about the catching up, the speed up and the meeting of the airplanes getting together—

A Yes, sir.

Q —and overtaking—

A Yes, sir.

Q That's what was said in the second statement, the September statement?

A That was what was said in the September statement. Again, that's the only statement I saw.

(p. 5-87) Q You would have no knowledge where we might find this first statement?

A No, sir, I do not.

The Court: You may step down, sir.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NOS. 83-4084, 83-4085

(Title omitted in printing)

(TRIAL EXCERPT)

* * *

(p. 7-57) AFTER MORNING RECESS

(The following proceedings were held in the courtroom outside the presence of the jury:)

The Court: Mr. Harrell, I understood you wanted me to come in without the jury because you wanted to make a proffer; is that correct?

Mr. Harrell: Your Honor, we would like to proffer the JAG report, which has been marked at BASI Exhibit 15. Of course, I recognize it will be just for identification.

The Court: There are some deletions to be made in it, if it's going to the jury.

Mr. Harrell. Judge, we have—

(p. 7-58) Mr. Partington: This is not the one you said—

Mr. Harrell: You have already ruled that you are not going to allow this whole report in, Judge, but I want to proffer it. That's the reason I wanted it outside the jury.

The Court: I said this, I think, about that report, that the only thing we really needed were the statements of fact and conclusions.

Mr. Harrell: We've got that one coming up, Judge.

The Court: However, anything attached to that report may be used by someone on examination of whoever prepared it. If he's not here to be examined, we don't need the rest of it. I think my rule went to whether it was needed.

Mr. Harrell: I understand, Judge. I just wanted to proffer it for the record. This is for identification. This is not in evidence.

The Court: All right, sir. Let it be marked for identification only—

Mr. Harrell: As BASI 15.

The Court: Under Rule 403, if it has any relevance, it's outweighed by prejudice or an undue waste of time.

Mr. Harrell: I understand, Judge.

(p. 7-59) The Court: And had the man that prepared that report been brought here, you could use it to cross-examine him. I suppose, Mr. Partington, if there's anything in there that contradicts the statement, we still could—

Mr. Partington: The only thing that we want to offer in is the maintenance record which he actually examined and attached to his report in connection with the statement he made about the maintenance.

The Court: I think, to that extent, it may come in.

Mr. Harrell: Judge, is this from the JAG report?

Mr. Partington: Yes. Those are actual copies of records from the JAG report.

Mr. Harrell: It's all right, Judge, but you were only going to let in the findings and the opinions that Mr. Womack has as a Beech exhibit, a revised exhibit—

The Court: No, Mr. Harrell, I did not so state. If I left that impression, I'm sorry. My only thought on it is this, that we need only that short statement that was in evidence. If, however, there are matters in that statement that any party, you or anybody, wishes to use to impeach the accuracy of the statement made about a matter that's in that record, then the party is at liberty to use it to that extent.

Mr. Harrell: Of course, we want to object to (p. 7-60) this, Judge, and make the record very clear that we object to the proffered JAG report as edited by Mr. Partington. It was my clear understanding that Mr. Womack had gone over with Mr. Partington—if Your Honor will remember—even to the point of adding Morgan's name because Mr. Partington said they wanted the name at the end of this exhibit.

Mr. Partington: This exhibit is identical and it is, in fact, a Xerox copy of what Mr. Womack prepared with Mr. Morgan's name. All I'm saying is—all I'm talking about, Judge, is these exhibits which go to his statement.

The Court: That's what I understood, too. This obviously has to be a correct and true copy of those pages, and certainly I can trust you attorneys to do that. I don't know what your objection is.

Mr. Partington: We've done that.

Mr. Harrell: Judge, you are misunderstanding me.

The Court: I must be.

Mr. Harrell: Let me try one more time.

The Court: All right, sir.

Mr. Harrell: It was my distinct understanding, and even after the second meeting, that the findings of fact and the opinions which are reflected would be what the Court was going to allow; and after we had had a conference, Mr. Partington said, "I want Mr. Morgan's name (p. 7-61) to appear at the bottom," and we went back and put his name at the bottom, just to satisfy Mr. Partington. It's my understanding that is what the Court had said it would allow into evidence.

The Court: I agree, and that's what I'm still allowing in evidence. I've gone beyond it here to say that if he wants to use some portion of the background of that report to try to impeach any factual finding in that report, he may do so.

Mr. Partington: I notice that exhibit does not have, as we agreed, on the bottom of it the man's name.

Mr. Womack: I will stipulate that you can write it on. This was being photographed before I knew you wanted to add it. This was edited according to the Court's ruling.

The Court: You've done it this way just as a convenience so that the jury can see it, I guess.

What is all the argument about? I don't understand it. Is my ruling clear to you now?

Mr. Partington: Yes, sir, and that's all I have, these little sheets—

The Court: That's just an exhibit for clarification, so that the jury can see it, I guess.

Mr. Toothman: These two do not agree.

The Court: I beg your pardon?

(p. 7-62) Mr. Toothman: These two do not agree. In his, he has reference to the fact that the emergency lever had not been installed.

The Court: What did you copy it from? Now I certainly don't understand. I know the pages that were before me in conference and if there's any deviation from those pages, I don't understand. I don't know why there is.

Mr. Toothman: There is no deviation.

Mr. Womack: We edited this, Your Honor—

The Court: He says he's got something that's different.

Mr. Partington: Wait a minute, Judge. May I please speak?

The Court: Yes, sir.

Mr. Partington: What I hold in my hand, Judge, is a true, accurate and correct copy of what was provided to me by Beech, that they were going to offer in on the findings of fact. Now, that's all I'm holding. They now have announced—and I'm not quibbling with it or quarreling with it, I simply want you to understand that I'm not trying to do something wrong here, Judge—

The Court: I know I had something in front of me and that's what is supposed to go to the jury. Now let's back up and see what's different.

(p. 7-63) Mr. Toothman: All he's got to do is cut out paragraph 8.

The Court: Let's see what this is.

Mr. Partington: I'm not offering this. May I approach the bench, sir?

The Court: Yes.

Mr. Partington: We're going to offer these documents here as an exhibit. Those are the findings that we have agreed with Beech to go in; okay?

Mr. Toothman: Except paragraph 8.

Mr. Partington: Now, since they prepared those findings, they have deleted from the findings paragraphs 8 and 9. If you would, please read those.

The Court: You have deleted paragraphs 8 and 9.

Mr. Toothman: Yes, sir. Paragraph 8 refers to the fact that this plane did not have, at the time, the emergency power lever we're not allowed to talk about.

Mr. Womack: I took 8 off, just cut it out.

Mr. Partington: Then you've got findings—

Mr. Curtis: Your Honor, there was never an issue that this aircraft did not have it. The issue was whether they put it on afterwards.

The Court: The issue was whether or not it could have been put on that plane or reasonably feasible.

Mr. Toothman: But that shows that it didn't have (p. 7-64) it in conformance with a Navy spec that was then in existence.

The Court: I think this is properly in evidence. It was not barred by my ruling. You came along and you went into a feasibility stipulation to keep the subject of a subsequent change from coming in. Since that time, we've gone into some other areas. But you were never willing to stipulate that it was not only feasible, but desirable. That's the reason for that ruling there.

However, it is also a part of the fact of matters here that this plane did not have it on. That's what this says.

Mr. Toothman: But it says it didn't have it on in accordance with the specifications which had been changed by that time.

The Court: It says that although much had been written about the need for a manual fuel control, and so forth. it still is not installed. I think that factual finding can come in.

Then the next one was nine, you left that out. (Reading) I don't know why that was eliminated, either. There's no issue on it. Why did you-all leave that out?

Mr. Toothman: I don't know why, Judge.

Mr. Harrell: Let me look, Judge. I can tell you why we left it out, because I thought the Court had ruled.

(p. 7-65) The Court: Ruled what?

Mr. Harrell: That it couldn't go in.

The Court: What are you talking about, eight or nine? I m talking about nine.

Mr. Harrell: We have no objection to it. We withdraw our objection to Mr. Partington's, insofar as BASI is concerned.

Mr. Gaines: Your Honor, in view of the fact that that is going in, we would like to offer two exhibits to document the fact that a proposal was made to Beech for the incorporation of the manual fuel control back in 1979; Pratt offers these two documents to support that.

Mr. Partington: We object to that, Your Honor.

The Court: This is being allowed into evidence because it shows that there was no control on this plane in 1978. That's the thrust and the pitch of their contention.

Mr. Gaines: That is not in any way disputed, Your Honor, so there is absolutely no reason to put that in evidence with that other statement which accompanies it that goes on to say that although it's available, et cetera, et cetera.

The Court: My only complaint with that, sir, is that you come now at trial—at pre-trial, I said that this comes in. Now you come along and have revised another (p. 7-66) one. As far as I'm concerned, Mr. Partington, if they want to stipulate that it was not on there, that's fine. We'll go along with what he's got there and leave out this other part about that although much had been written, still not installed. If you want to do that and stipulate, fine.

Mr. Toothman: We'll stipulate that it was not on this airplane.

Mr. Larry: I'd like that JAG officer to be saying to the jury that it wasn't on that plane.

Mr. Gaines: The reason he would like that, Your Honor, is because that report says that it had been proposed but had not yet been adopted.

The Court: The main thing is that BASI is willing to stipulate that it was not on that plane. That answers every objection I have in my mind. We've had too much of this kind of thing going on here. I want to drop it now.

Mr. Harrell: Judge, if we get this—I would just like to renew my objection because he says he's not going to put this in—

The Court: He's going to use some of it—

Mr. Harrell: It's my understanding—

The Court: If you want to object to him using that, your objection is noted and overruled.

Mr. Harrell: I understand. I want the record (p. 7-67) to be clear that I'm objecting to his putting in just portions. The Court has ruled out the JAG manual and it was my understanding that only the findings and opinions would be—

The Court: Mr. Harrell—

Mr. Harrell: I just want that on the record. I misunderstood and I apologize.

The Court: All right, sir. You've put it on the record about four times. Let's get through putting it on the record.

Mr. Harrell: I'm through. The thing about it is, I want to be sure, because there's been a misunderstanding develop since then.

The Court: What about this nine, I don't see where that makes much difference, Mr. Partington.

Mr. Partington: I don't have any problem with that, Judge.

The Court: Let's go with what you have there, but we'll start this off somewhere by stipulating that the manual control system was not on the plane at the time it was sold and delivered to the Navy.

Mr. Womack: That's correct.

Mr. Partington: Judge, the only thing that I request is that the jury be advised that this report is a report of one man. Now, I have asked, and they were going (p. 7-68) to put on it, type on the exhibit, the name of the one man who prepared it. It isn't on there and they want me to come over there and scribble it on.

Mr. Womack: Judge, these were out being developed, but I will stipulate that they can add it anywhere—

The Court: There's no objection to stipulating and telling the jury that the parties are in agreement that this was prepared by one JAG officer and his name, is there?

Mr. Womack: Absolutely none.

Mr. Gaines: He's not a JAG officer. One officer.

Mr. Womack: I'll stipulate to that in any way you want.

The Court: Have you put this in evidence yet?

Mr. Womack: Yes, sir. The JAG report, according to your ruling, was admitted earlier. This is an enlargement that comports with your ruling.

Mr. Partington: I don't think it has been admitted.

Mr. Womack: It isn't?

Mr. Partington: No, sir.

Mr. Womack: I'm sorry.

Mr. Partington: I'm not sandbagging, I'm just—

Mr. Harrell: I want to be sure that it's in. The next thing I would want to do is get Mr. Womack—

(p. 7-69) Mr. Womack: We would offer it as a composite exhibit, Beech's next number.

The Court: We can get the jury back in, you can offer it then as an exhibit, and also at that time, put your stipulation on about this manual thing and the fact it was signed or prepared by one man.

Mr. Womack: Give me his name.

Mr. Partington: Morgan.

The Court: For record purposes, we better get the jury in.

Mr. Womack: Can I use this as an exhibit for the record and use this in argument? That's the way it ought to be.

Mr. Womack: We've got a few more exhibits, Judge, that I want to offer.

The Court: I'm not sure why we're doing all of this out of the presence of the jury. Are you ready to let the jury in?

Mr. Partington: I'm sorry, what—

The Court: This is what is going in evidence?

Mr. Partington: Yes, sir.

The Court: And use this as an enlargement of it, and so tell the jury?

Mr. Partington: Yes.

The Court: And we're also going to tell the (p. 7-70) jury that this report was prepared by one man whose name is so and so.

Mr. Partington: That's right.

The Court: And you're also going to make the stipulation before the jury that this plane that was sold to the Navy had no—

Mr. Partington: Didn't have it on at the time of the crash.

The Court: Had no manual backup system for fuel control at the time of the sale.

Mr. Womack: Yes, sir.

Mr. Partington: Yes, sir.

The Court: Call the jury back in.

(The following proceedings were held in the courtroom in the presence of the jury:)

The Court: You may proceed, sir.

Mr. Womack: Yes, Your Honor. May it please the Court, ladies and gentlemen of the jury, we have stipulated and agreed and His Honor has approved the statement that at the time the aircraft was delivered to the Navy, it did not have a manual override system in it.

We have offered further as an exhibit certain findings of fact and opinions from the JAG report, which His Honor has allowed into evidence as Beech's next exhibit. This was prepared and signed by an officer W. C. (p. 7-71) Morgan, Jr.

His Honor has allowed us to make a blowup of these so it will be a little easier for you to read it.

The Court: Just to keep the record straight, there is an objection to part of this coming in evidence, was there not?

Mr. Partington: I believe those matters were resolved.

The Court: As long as the record is clear, that's all right. Let it be received in evidence. It would be your exhibit, I guess, would it not, Mr. Womack?

Mr. Womack: Yes, sir, Exhibit 37. I think all of the rest of mine are in.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NOS. 83-4084, 83-4085

(Caption omitted in printing)

(EDITED JAG REPORT)

JAG REPORT

Findings of Fact

1. At approximately 1020 local on 13 July 1982, a U.S. Navy T-34C aircraft, bureau number 160955, piloted by LCDR Barbara A. Rainey crashed approximately two miles Southeast of Middleton Airport near Evergreen, Alabama [enclosure (3)].

2. LCDR ~~Barbara~~ A. Rainey, 558-72-0652, USNR, reported to Training Squadron THREE on 16 November 1981 [enclosure (4)]. At the time of the accident LCDR Rainey was fully NATOPS qualified (Naval Air Training and Operation Procedures Standardization Program) and Instrument qualified [enclosure (5)] as well as being a qualified familiarization instructor [enclosure (6)]. As of 12 July 1982, LCDR Rainey had accumulated 1331 total flight hours of which 209 were logged in the T-34C aircraft. LCDR Rainey had logged 96.2 hours during the 90 days preceding the accident [enclosure (7)]. LCDR Rainey's Aviator's Log Book indicated no record of previous accidents or flight violations [enclosure (8)].

3. ENS Donald B. Knowlton, 548-04-6268, USNR, was on active duty and checked into Training Squadron THREE on 24 May 1982 for duty as a Student Naval Aviator [enclosure (9)]. He had an average flight grade of 2.94 and

had accumulated 4.5 hours in the T-34C aircraft [enclosure (10)].

4. LCDR Rainey was physically qualified for flight duty and was in a flight status on 13 July 1982 [enclosure (11)].

5. ENS Knowlton was physically qualified for flight duty and was in a flight status on 13 July 1982 [enclosure (12)].

6. LCDR Rainey and ENS Knowlton were scheduled to fly Familiarization Flight Four at 0645 on 13 July 1982 by Training Squadron THREE's flight schedule authorizing the flight [enclosure (13)].

7. Aircraft 160955, a T-34C, was accepted by the Navy on 26 September 1978. Inspection of the aircraft records, history, and logs revealed that all required maintenance inspections and technical directives had been complied with [enclosure (14)]. There was one outstanding discrepancy, the air-conditioning ground blower door spring was broken [enclosure (15)].

9. LCDR Rainey and ENS Knowlton were issued aircraft 160955 and LCDR Rainey signed the acceptance sheet thereby assuming the responsibility of pilot in command [enclosure (22)].

10. Review of North Whiting Tower traffic control strips for 13 July 1982 show that aircraft 160955 (3E955) departed North Whiting Field at 0915 local under VFR conditions [enclosure (23)].

☐ Beech A/C No. 37

For Identification .....

Rec'd in Evidence V

11. The weather observed indicated no conditions that would have a direct effect on the flight [enclosure (24)]. Weather in the Middleton pattern was excellent with no clouds, visibility 5 miles or more, and winds light and from the south [enclosures (25), (26), (27) and (28)].

12. At approximately 1001, 3E955 entered the pattern at Middleton Field for Runway 18. At least four approaches were flown with a minimum of two "touch and go's" completed prior to the accident [enclosure (28)].

13. At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned [enclosures (25), (27), (29), (30), (31) and (32)].

14. Upon receiving notification of a crash and seeing smoke to the southeast of Middleton Field, the crash crew immediately began transit to the crash site [enclosures (27), (28) and (29)].

15. The wreckage of 3E955 crashed into a farmer's field of cutover timber with scattered trees in the area. The area has slightly rolling hills with a small dirt road passing near the crash site [enclosure (41)].

16. 3E955 crashed on property owned by Mr. Roger Warrick. Transit to the crash site required that the crash crew and other vehicles cross property owned by Mr. William W. Ward [enclosure (42)].

17. During transit to the crash site, the crash crew had difficulty in locating the wreckage due to the muddy road conditions and the circuitous route required to go around a small stream and fallen trees. Additionally, there were no current, detailed maps of the local area available to the

crash crew. 3E467, piloted by LCDR Richard E. Blake, was over the crash site and assumed on scene command and attempted to direct the crash crew to the wreckage [enclosures (27), (28), (31) and (33)].

18. ABHI R. S. Scribner stated that at approximately 1022 local, he stopped the crash truck and picked up a civilian who assisted in locating the wreckage of 3E955 [enclosure (28)].

19. LT Ted J. Choley stated that at approximately 1030 local, he received a call from LT Will Carpenter on base radio stating that there was an accident at Middleton Field [enclosure (36)].

20. At 1035 local, North Whiting Field operations was notified of a possible aircraft accident near Middleton Field [enclosure (37)].

21. Upon arrival at the wreckage at 1040 local, the crash crew immediately began efforts to extinguish the fire using AFFF (lite water) and attempted to locate survivors. No response was heard to ABHI Scribner's call to crewmembers of the aircraft. The burned bodies of both pilots were noted at this time [enclosures (27), (28), (34) and (35)].

22. When all the AFFF (lite water) on the truck was depleted, the crash crew used all of the portable fire extinguishers on the truck in an attempt to put out the fire. When this failed, they resorted to shoveling dirt on the fire in an attempt to smother it [enclosures (27), (28), (31), (34) and (35)]. At 1042 local, all fires were extinguished with the exception of a magnesium fire which the crash crew was unable to put out [enclosure (38)].

23. LCDR Rainey sustained a lethal neck injury at impact but bodily functions continued for an undetermined period [enclosures (52) and (55)].

24. ENS Knowlton was killed instantly due to massive head injuries sustained at impact [enclosures (52) and (56)].

25. At some undetermined point in the crash sequence, the rotary buckle holding the shoulder straps of the from cockpit harness failed [enclosure (50)].

26. At some point during the flight or the subsequent crash, a LPA (life preserver assembly) inflation lever was moved to the activated position [enclosure (51)].

27. At the time of impact, the engine of 3E955 was operating but was operating at reduced power [enclosure (48)].

28. At 1050 local, HT-18 launched aircraft 171 as a SAR (search and rescue) mission to Middleton Field [enclosure (39)]. The aircraft arrived at the crash site at 1125 local and assumed on scene command from 3E467. 3E467 was relieved from communications relay duties at 1130 local [enclosure (33)].

29. Upon landing at the site, the crew of aircraft 171 was informed that there were no survivors [enclosures (43), (44) and (45)].

30. At 1050 local, HC-16 was notified by phone of an aircraft accident near Middleton Field. At 1105 local, a UH-1N launched and proceeded to the crash site, arriving there at 1150 local. Upon landing, HC-16 was requested to transport the bodies of the victims to NARMC (Naval Aerospace Regional Medical Center). The remains of the pilots were removed from the wreckage, placed in body

bags, and moved to the helicopter. Takeoff from the crash site was at 1430 local and arrival at NARM was at 1515 local. The remains were taken from the helicopter and placed in an ambulance for transportation to the hospital [enclosure (40)].

31. An Engineering Investigation was conducted on the engine of aircraft 160955 by the Naval Air Rework Facility, NAS Pensacola, Florida [enclosure (48)].

Opinions

1. Examination of the findings of fact, aircraft history and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that the LCDR Rainey or ENS Knowlton were not physically, sociologically, or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure to ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

5. Because both pilots were killed in the crash and because of the nearly total destruction of the aircraft by fire, it is almost impossible to determine exactly what happened to Navy 3E955 from the time it left the runway on its last touch and go until it impacted the ground.

7. The most probable cause of the accident was the pilots failure to maintain proper interval.

W. C. MORGAN, JR.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JOHN C. RAINEY, Individually, and
as Personal Representative of the
Estate of BARBARA A. RAINEY,

Plaintiff,

vs. PCA 83-4084

BEECH AIRCRAFT CORPORATION, et al.,

Defendants.

_____/

RONDI M. KNOWLTON, Individually, and
as Personal Representative of the
Estate of DONALD BRUCE KNOWLTON,

Plaintiff,

vs. PCA 83-4085

BEECH AIRCRAFT CORPORATION, et al.,

Defendants.

_____/

VERDICT

We, the jury, return the following verdict:

1. Was the Fuel Control System in the T-34C involved in this case defective by reason of its design and, if so, was such defect a legal cause of the deaths of Barbara A. Rainey and Donald Bruce Knowlton?

——— YES —✓— NO

2. Was there negligence on the part of Beech Aircraft which was a legal cause of the deaths of Barbara A. Rainey and Donald Bruce Knowlton?

——— YES —✓— NO

3. Was there negligence on the part of Pratt & Whitney which was a legal cause of the deaths of Barbara A. Rainey and Donald Bruce Knowlton?

——— YES —✓— NO

4. Was there negligence on the part of Beech Aerospace (BASI) which was a legal cause of the deaths of Barbara A. Rainey and Donald Bruce Knowlton?

——— YES —✓— NO

If all your answers so far are NO, your verdict is for the defendants and you should not proceed further except to date and sign this verdict and return it to the courtroom. If your answer to any question so far is YES, please continue.

5. Was there negligence on the part of Barbara A. Rainey which was a legal cause of her death?

——— YES ——— NO

If your answer to question 5 is NO do not answer question 6.

6. State the percentage of any responsibility that you charge to:

Beech Aircraft Corporation
[fill in only if you answered
YES to questions 1 or 2] ———%

Beech Aerospace Services, Inc. (BASI) ———%
[fill in only if you answered
YES to question 4]

Pratt & Whitney Aircraft of Canada,
Ltd.
[fill in only if you answered
YES to questions 1 or 3) ———%

Barbara A. Rainey ———%

100 %

Your answers to question 6 must total 100% and should include a zero for any party for which you answered NO to all parts of questions 1 through 5.

SO SAY WE ALL this 20th day of July, 1984.

S/
/
FOREPERSON

JUDGMENT IN A CIVIL SUIT

(Filed July 23, 1984)

UNITED STATES DISTRICT COURT	District NORTHERN FLORIDA
Case Title JOHN C. RAINEY, Individually and as Personal Representative of the Estate of BARBARA A. RAINEY V. BEECH AIRCRAFT CORPORATION, BEECH AEROSPACE SERVICES, INC., et al	Docket Number PCA 83-4084
	Name of Judge or Magistrate WINSTON E. ARNOW, Senior Judge

X Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants BEECH AIRCRAFT CORPORATION; BEECH AEROSPACE SERVICES, INC.; and PRATT AND WHITNEY AIR-

CRAFT OF CANADA, LTD. recover of the plaintiff JOHN C. RAINEY their costs of action.

Dated at Pensacola, Florida

Clerk
MARVIN S. WAITS

Date
July 23, 1984

(By) Deputy Clerk
/s/ DEBBIE BLACK

JUDGMENT IN A CIVIL CASE

(Filed July 23, 1984)

UNITED STATES DISTRICT COURT	District NORTHERN FLORIDA
Case Title RONDI M. KNOWLTON, Individually and as Personal Representative of the Estate of DONALD BRUCE KNOWLTON V. BEECH AIRCRAFT CORPORATION, BEECH AEROSPACE SERVICES, INC., et al	Docket Number PCA 83-4085 Name of Judge or Magistrate WINSTON E. ARNOW, Senior Judge

X Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants BEECH AIRCRAFT CORPORATION; BEECH AEROSPACE SERVICES, INC.; and PRATT AND WHITNEY AIRCRAFT OF CANADA, LTD. recover of the plaintiff RONDI M. KNOWLTON their costs of action.

Dated at Pensacola, Florida

Clerk
MARVIN S. WAITS

Date
July 23, 1984

(By)Deputy Clerk
/s/ DEBBIE BLACK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NOS. 83-4084, 83-4085

(Caption omitted in printing)

Letter from LCDR John C. Rainey to
LCDR W. C. Morgan, filed with the District Court
on August 1, 1984 as an attachment
to Plaintiffs' Motion for New Trial

From: LCDR John C. RAINEY, USNR, 566-86-9769/1315

To: LCDR William C. MORGAN, USN, TRARON THREE Investigating Officer for the Judge Advocate General Manual Investigation of TRARON THREE Class A Mishap 2-82 of 13 July 1982

Subj: Items for inclusion and investigation in the Judge Advocate General Manual Investigation of TRARON THREE Class A Mishap 2-82 of 13 July 1982

Encl: Witness Statement of ENS Joseph G. ARNETT

1. Enclosed is a statement by ENS Joseph G. Arnett, USN, 247-02-9002/1390 concerning the TRARON THREE Class A flight mishap of 13 July 1982. ENS Arnett was a witness to the accident that claimed the lives of LCDR Barbara A. Rainey, USNR, 558-72-0652/1315 and ENS Donald B. Knowlton, USNR, 548-04-6268/1395 but a statement was not requested from him. In addition, I wish to have included and investigated in the Judge Advocate General Manual Investigation, various items which may have had an effect upon the mishap but which might not have been uncovered by the investigation thus far. Each major item is mentioned and analyzed independent of the others. The actual sequence of events that transpired on

13 July 1982 was, in all probability, an unfortunate combination of all of these factors.

2. LCDR Rainey attempted to cancel this flight at approximately 0840 but, effectively, was not allowed to do so. The circumstances surrounding her decision were as follows:

a. The student, ENS Donald B. Knowlton, USNR, had been up since 0430. The flight event had a scheduled brief time of 0645. Aircraft 494 was issued to LCDR Rainey at 0710. A normal preflight, engine runup, and checklist completion for a FAM 4 student should require approximately forty-five minutes. Aircraft 494 was experiencing UHF radio difficulties that required either maintenance action or a replacement aircraft for the event. Evidently, no replacement aircraft was available and the aircrew was advised to bring the inoperative aircraft back and to wait for another airplane to be issued. As LCDR Rainey and ENS Knowlton were awaiting a replacement aircraft, LCDR Rainey was advised that ENS Knowlton was scheduled for a mandatory ground school examination at 1200. Assuming a normal three hour time frame for an entire early stage familiarization flight (excluding debrief), LCDR Rainey correctly surmised that inadequate time remained to conduct the flight in its entirety and provide a meaningful debrief and still allow enough time for ENS Knowlton to attend his test. This, coupled with the fact that it was raining heavily at the airfield, that the student was tired and probably emotionally drained due to the elapsed time without flying, and that LCDR Rainey had another scheduled flight event at 1015, dictated that the prudent course of action would have been

to cancel ENS Knowlton's flight and to pick up the next student at his scheduled brief time.

b. At approximately 0840, LCDR Rainey was overheard by CAPT Guthrie, USMC, 545-76-7641/7565, in a phone conversation with LT Choley, the TRARON THREE Flight Duty Officer, attempting to cancel the flight with ENS Knowlton. On three separate occasions, LCDR Rainey requested to cancel her event. She was observed to terminate the conversation in an uncharacteristically heated and disgusted manner. Given the elapsed time from the issue of the second aircraft until the call outbound to TRARON THREE base (0845 issue, 0907 outbound call received), it is logical to assume that LCDR Rainey performed the entire preflight, checklists, and the engine runup in an effort to save time and facilitate a return prior to 1200. It might be significant to note which pilot made the outbound call, exactly what was said, and the perceived tone in which it was said.

c. This flight and the pressure exerted in this instance would appear to be unnecessary but indicative of operations existing in the squadron at that time. Instructor pilots and their students reportedly were pressured to take out flight events, under less than suitable conditions, in pursuit of student completion figures far exceeding goals established by CNATRA. At the time of this accident, TRARON THREE was presenting potential funding problems for all fixed-wing squadrons in TRAWING FIVE by exceeding its OPTAR flight hour allowances by approximately 4300 hours and its Pilot Training Rate by approximately sixty students.

3. Emphasis on possible excessive and inappropriate trim settings introduced by ENS Knowlton is not warranted. The known sequence of events, witness testimony, and real evidence do not support such a theory:

a. 3E955 entered the touch and go pattern for runway 18 at Middleton OLF at 0959. Familiarization syllabus flight four includes the introduction of full flap approaches and full flap landings. Introduce is defined by the T-34C Flight Training Instruction as:

> "Instructor: At his/her option, may perform the maneuver with accompanying description or may coach the student through the maneuver without demonstration."

3E955 made four passes at the runway prior to the mishap. The first two passes resulted in wave-offs and the last two were satisfactory in terms of approach path and touchdown point.

b. It is most probable to assume, that following two unsuccessful attempts by the Student Naval Aviator to land the aircraft, LCDR Rainey demonstrated proper full flap approach and landing technique on the third pass. It is also most likely to assume, (based on past discussions between LCDR Rainey and myself concerning instruction technique to be employed when a student was experiencing difficulty with a particular maneuver), that the Instructor Pilot flew the aircraft on the fourth pass with the student accompanying the Instructor Pilot on the controls to get a better feel for proper corrections. To assume that a student, apprehensive following two missed approaches, could land the aircraft by himself "in the box" is not logical.

c. It must be assumed that the Instructor Pilot would have relinquished control of the aircraft in a condition

of proper trim for the given aircraft configuration and power setting. For the one approach that ENS Knowlton could have possibly flown the airplane (the fourth pass), it is extremely improbable to suggest that he would have imparted full nose up trim upon the aircraft. Early stage familiarization students typically trim the aircraft only at two positions in the landing pattern, if at all. These two positions are when leveling off at pattern altitude (nose down, left rudder) and the 180° (abeam) position (nose up, rudder in direction of turn-in this case left). Historically, early stage familiarization students do not overtrim. One of the most difficult tasks confronted by a familiarization instructor is convincing the student to trim at all. ENS Knowlton had a history of basic airwork difficulties associated with inadequate trim.

d. A stall encountered as a result of full nose up trim would have resulted in an abrupt pitch up of the aircraft's nose. No witness testimony reports such a maneuver. The aircraft pitched down and rolled right.

e. Concluding that full nose up trim had been present but was removed during the recovery attempt by LCDR Rainey is not very probable. The short period of time from aircraft departure to impact would not have allowed trim adjustment. The primary concern of the pilot-in-command would have been to right the aircraft and get it flying again.

f. Finally, post-impact examination of the aircraft wreckage does not support this theory. The trim control cables were found to be in a neutral (or zero trim) position. The port elevator trim tab was deflected significantly downward but, since both elevator trim tabs deflect

when trim is actuated, it can not be used as the sole indication of excessive nose up trim.

4. Substantial emphasis has been placed upon the violation of pattern integrity committed by 3E955 as it turned crosswind without proper interval. Such criticism is valid. It does not, however, reflect the entire situation that existed at Middleton on 13 July 1982.

a. Between 3E955's third and fourth passes, 3E644 entered the Middleton touch and go pattern, bringing the total number of aircraft present to six. 3E644 failed to turn downwind when proper interval was attained (instead continuing straight ahead at 170 KIAS), and elongated the traffic pattern considerably, extending the pattern a minimum of an additional mile and making it extremely difficult for aircraft following him to visually acquire him and take proper interval. At the time of the accident, no crosswind call was required to alert other aircraft in the pattern of 3E644's position.

b. At the completion of the second touch and go landing, 3E955 commenced a climbout to rejoin the landing pattern. Upon reaching 300 feet AGL with the flaps retracted, a visual inspection of the normal crosswind and downwind portions of the pattern would have revealed no conflicting traffic. Statements from ENS Arnett, CAPT Guthrie, and LT Kolakowski reveal that 3E644 was extended so far upwind that it was extremely difficult, if not impossible, to see. At this point, 3E644 had not yet reentered the normal confines of the traffic pattern.

c. After about 40° of heading change by 3E955, CAPT Guthrie was able to pick up 3E644 on a very extended

downwind and informed 3E955 that they appeared to be cutting someone out. Given the difficulties encountered on the first two approaches and the fact that LCDR Rainey most probably flew the third approach, it is most likely to assume that the transmission from CAPT Guthrie was not heard by 3E955 due to ICS communication concerning the previous touch and go. It is a very common practice in the T-34C aircraft to have ICS volume louder than UHF radio volume in order to allow both occupants to converse, without interruption, in extremis situations. The side tone present during ICS transmissions dictates that both pilots will hear the ICS conversation that is taking place, regardless of which pilot is speaking. No rational instructor pilot would intentionally ignore a warning and continue on a course that is potentially dangerous to himself and others solely to test the student's awareness of his surroundings.

d. Assuming that the transmission from 3E644 was received by 3E955, a visual scan of the area of potential conflict would not have revealed an airplane or a dangerous situation. A dangerous situation did not exist due to the fact that 3E644 was still at least one half mile upwind of 3E955. Failure to acquire an aircraft reported in close proximity would have caused considerable apprehension for the pilots of 3E955. Accordingly, some maneuver would be called for to bring 3E644 into view and remove the possibility of collision.

e. 3E955 was observed to turn to the south, roughly paralleling runway heading. Such a maneuver would have provided lateral separation and, had a collision danger actually existed, provided sufficient time for 3E644 to

pass well clear to the north. Instead, when 3E955 rolled wings level on a southerly heading, 3E644 came into view unexpectedly and at its closest point of approach. Actually, sufficient separation still existed between aircraft. However, the unexpected proximity of 3E644 caused one of the aircrew in 3E955 to react instinctively and abruptly by initiating a hard right turn away from 3E644.

5. The most probable primary cause factor of this aircraft mishap is a loss of useful power (or rollback) caused by some form of pneumatic sensing/fuel flow malfunction, probably in the fuel control unit.

a. For the reasons stated in paragraph 3b above, I believe LCDR Rainey was the pilot-at-the-controls for the final touch and go. After completing the second touch and go landing, LCDR Rainey attempted to commence a normal climbout. It is most unlikely that control of the aircraft would have been passed to a FAM 4 student on the runway or at any altitude prior to flap retraction at 300 feet AGL. Based upon the observations of CAPT Guthrie (who was rapidly overtaking 3E955, with no appreciable discrepancy in climb-out flight paths, at a point when both aircraft should have been at maximum power), I believe that 3E955 began experiencing a gradual loss of effective power, or rollback, due to some form of fuel flow malfunction. If ENS Knowlton had been flying the aircraft, LCDR Rainey would have assumed control at this point. Due to the elongated pattern and poor rear cockpit visibility, a quick visual scan revealed no conflict with other aircraft in the pattern (and therefore, no immediate need for a radio transmission) and a climbing left turn back toward the field was initiated.

b. As mentioned previously in paragraph 4c, CAPT Guthrie observed the apparent conflict with 3E644 and made a transmission informing 3E955. If 3E955 was experiencing difficulty at this point, it is possible that they never heard the call from 3E949 due to ICS communication required to deal with the problem at hand. Even if 3E955 heard the transmission, CAPT Guthrie states that 955 presented no real collision danger to 644 (due to the extended nature of the pattern) and may have chosen to ignore 644 in order to deal with the malfunction.

c. I find this explanation entirely feasible due to the fact that 2E949 was both overtaking and, later, outclimbing 3E955 when both aircraft should have been climbing at maximum power and 100 KIAS. To attribute 949's closure with 955 to poor airspeed control on the part of the Student Naval Aviator is to overlook the observed poor climb performance of 955. Any reduction in airspeed without a reduction in power, due to distractions outside the aircraft, should have yielded even greater climb performance. None was noted. In fact, 3E955 never achieved pattern altitude.

d. Had the engine rolled back to minimum fuel flow prior to 3E955's attainment at least 1300 feet AGL for their geographical position in the pattern (and with no emergency power level installed to enable the aircrew to comply with SECTION V of the T-34 CNATOPS concerning loss of usable power) the only alternative left to LCDR Rainey would have been to maintain flying airspeed and maneuver to a suitable crash-landing site. From a climbing left hand turn, such a transition would have consisted of lowering the nose of the aircraft and turning, in the

shortest direction, toward the most acceptable emergency landing area. Interstate Highway 65, about one half mile to the south of 3E955's position, provided the nearest and the only reasonably attainable landing site. 3E955 commenced a right turn directly toward I-65.

e. The T-34C has a glide ratio of approximately 2NM per 100 feet of altitude at a sink rate of 500-700 FPM in a clean configuration at the prescribed airspeed of 100 KIAS. Leaving the landing gear down increases the sink rate to approximately 1000 FPM with a corresponding decrease in glide range. From an observed altitude of 500-600 feet AGL, it should not have been necessary to retract the landing gear to travel the distance to I-65. The statement of LT Ronald G. Kolakowski, USN, 215-62-9792/1310, another instructor pilot present in the pattern at Middleton OLF on 13 July 1982, reflects, almost exactly, the above sequence of events.

f. While turning toward I-65, LCDR Rainey would have been checking the engine instruments to determine the nature of the problem. Because the engine was still running (although at a significantly reduced power output), the difficulty at hand may not have been readily apparent. When finally recognized as a loss of useful power, it could not have been dealt with in accordance with the T-34C NATOPS due to the absence of the Emergency Power Lever and manual fuel control in 955. The only course of action available to LSDR Rainey would have been to feather the propeller and execute an emergency landing.

g. Before the above actions could be completed, the apparent conflict with 3E644 caused on of the aircrew to

initiative an evasive maneuver to the right. The abrupt control input and exremely low power caused the aircraft to depart in an attitude of approximately 20° nose down and 90° angle-of-bank. According to the statements of 2/LT Pierson, the student in 3E644, and LT Kolakowski, 3E955 was observed to return to an upright condition and should have been able to safely depart the Middleton pattern if maximum power had been available. Without power (and with insufficient time and altitude remaining to feather the propeller and retract the landing gear), LCDR Rainey was forced ot attempt an emergency landing to the only clear area available, a dirt road in the midst of extremely rough terrain. The aircraft impacted the ground about 200 yards short of I-65 in a slightly nose low and left wing down attitude at an airspeed of approximately 80 KIAS with an impact force of approximately twenty to twenty-five G's. Post crash analysis revealed that the engine was at low RPM and the propeller was at the low pitch stop while the throttle and propeller control were in full forward position, indicating, according to an independent analyst, that maximum power was being requested from the engine, but not received. Power available may have been limited to as low as 36-46% N1.

h. I believe that the small amount of evidence that does exist for this mishap points strongly towards a loss of available power, or rollback, caused by a fuel flow malfunction, most probably in the fuel control. In fact, a verifiable history of rollbacks in the T-34C does exist. The fact that a highly qualified instructor (with three years of experience in teaching students and instructors in the T134C landing pattern) observed a rapid closure rate

which dissipated normal touch and go interval in less than a mile can only be logically explained by a loss of power. No other explanation is possible, at maximum power, without a significantly different climbout path by 3E955. Another witness is the pattern (also an experienced CAT I Instructor Pilot) has also stated that 3E955 exhibited characteristics of an aircraft experiencing difficulty. I submit that a loss of useful power is the only cause factor for which both real evidence and witness testimony exists. If a rollback took place, all conjecture concerning failure to maintain pattern integrity and proper interval loses significance due to the aircrew's efforts to deal with an emergency situation and, in any case, omits the fact that 3E644 contributed directly, significantly, and equally to that problem. All supposition concerning trim settings or control of the aircraft (or lack thereof) is secondary to the most obvious and significant cause, the loss of useful power.

i. If a rollback occurred, LCDR Rainey had few options available due to her low altitude, particularly subsequent to the abrupt turn. The installation of the Emergency Power Lever, utilization of which is a NATOP'S SECTION V memory item for loss of useful power, would have provided LCDR Rainey another option and might have prevented this accident altogether. Since this mishap, another TRAWING FIVE aircraft experienced a rollback that resulted in a damaged airframe but, fortunately, no loss of life. Although many valid recommendations can and have been made, the foremost recommendation from the crash of 3E955 should be to assign the highest priority to the installation of the Emergency Power Lever

in all T-34C aircraft immediately before any further lives are lost.

6. The rescue efforts concerning this mishap require further investigation for the following reasons:

a. Immediately following impact, LT Kolakowski, in 2E522, was the first aircraft on the scene of the accident and attempted to assume the duties of on-scene commander. He relinquished those duties and departed the pattern, replaced by LCDR Richard E. Blake in 3E647, who then became responsible for the coordination of rescue efforts.

b. The rough and, sometimes, impassible terrain, in conjunction with the Middleton crash crew's inadequate knowledge of the area surrounding the airfield, resulted in an elapsed time of twenty-one minutes from impact to the arrival of the crash crew at the scene. The crash site was approximately 1.5 NM from the end of the duty runway. By the time the crash crew did arrive, the post-impact fire had progressed to a point where it could not be extinguished with the meager fire-fighting assets available at Middleton OLF. After exhausting the ninety seconds of extinguishing agent present on their truck, the crash crew resorted to shovelling dirt on the cockpit area in an effort to put out the fire.

c. The first notification call recorded by HC-16, the SAR unit for the Pensacola area, was received approximately 30 minutes after LCDR Blake assumed on-scene commander. HC-16 launched a UH-1N aircraft to respond to the SAR call. The crew of the SAR helo was heard, by other airborne aircraft, to request directions to Middleton OLF, an airport within their area of responsibility

which is utilized by TRAWING FIVE aircraft every weekday. They arrived at the accident scene approximately one hour and forty minutes after impact. Upon arrival, the SAR aircrew engaged in an argument, over the radio, concerning their duties involving the transportation of corpses. The discussion continued for approximately four hours after the UH-1N landed.

d. The entire SAR evolution for this accident must be considered unsatisfactory. In this instance, the victims died upon impact or shortly thereafter. The resultant implication, however, is that all TRAWING FIVE flight personnel can expect an equally unacceptable (or possibly worse, depending on crash site proximity to NAS Pensacola) SAR response.

e. The fire-fighting capability of the crash crew Middleton OLF is inadequate for all but the most favorable circumstances. If the fire has developed past initial ignition or if the post-impact attitude of the aircraft is other than upright, it must be assumed that the Middleton crash crew will be unable to rescue both occupants. The fact that the crash crew was unfamiliar with the area surrounding the field exacerbated the problem in this instance.

f. Definite procedures for the scene-of-action commander need to be developed in order to facilitate future SAR efforts and to preclude future loss of life. Presently, coordinated procedures either do not exist or have not received wide enough dissemination among TRAWING FIVE instructor pilots. The delay in notifying HC-16 of a mishap requiring SAR assistance would have been un-

acceptable and, possibly, fatal had there been critically injured survivors on the ground.

g. The response time of HC-16 dictates that a dedicated SAR aircraft, manned by a crew familiar with the TRAWING FIVE operating area, needs to be located at Whiting Field. The resulting decrease in transit time for the SAR aircraft might save lives in the future.

7. I submit the above for you consideration in order to present aspects of the incident that may not have been covered and in the interest of obtaining the most complete and objective investigation possible.

Respectfully,

/s/ John C. Rainey
JOHN C. RAINEY
LCDR USNR

Copy to:

Staff Judge Advocate General, Chief of Naval Air Training

Staff Judge Advocate General, Chief of Naval Education and Training

Investigations Division, Office of Judge Advocate General of the Navy

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UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NOS. 84-3625, 84-3626

Panel Opinion of March 25, 1986

784 F.2d 1523

John C. RAINEY, Individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Canada, Ltd., Defendants-Appellees.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

United States Court of Appeals,
Eleventh Circuit.

March 25, 1986.

Appeals from the United States District Court for the Northern District of Florida.

Before FAY and JOHNSON, Circuit Judges, and HOFFMAN*, District Judge.

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* Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

Barbara Ann Rainey and Donald Bruce Knowlton died on July 13, 1982 in a fiery plane crash at Middleton Field, Alabama. Their spouses, John Charles Rainey ("Rainey") and Rondi M. Knowlton ("Knowlton") sought money damages under the Florida Wrongful Death Act, Fla.Stat. §§ 768.16-.27 (1985), in district court.[1] The jury returned a verdict against Rainey and Knowlton. We hold that the trial judge committed reversible error in two evidentiary rulings and remand for a new trial.

I.

On July 13, 1982 Lieutenant Commander Barbara Ann Rainey, a flight instructor with the United States Navy, was issued a T-34C Turbo-Mentor aircraft, number 3E955, for a training exercise at Middleton Field, Alabama. Her student was Ensign Donald Bruce Knowlton. Ensign Knowlton was to practice "touch and go" landings and takeoffs.[2] There were five aircraft in the "touch and go" pattern.

1. Rainey brought suit individually, as the personal representative of his wife's estate, and on behalf of his minor children, Cynthia Ann Rainey and Katherine Marie Rainey. Knowlton sued individually, as the personal representative of her husband's estate, and on behalf of her minor children, Ramsey Nia Knowlton and Branigan McDermott Knowlton. By order dated March 20, 1984 the two cases were consolidated "for all purposes including consolidation for trial."

2. A "touch and go" is a training exercise employed to familiarize students with takeoffs and landings. After takeoff, the student circles the airfield in an oval or racetrack pattern and then lands the aircraft. Upon landing, the student does not stop the craft, but accelerates to take off again.

Witnesses testified that Ensign Knowlton, after successfully completing four "touch and go" patterns, began "climbing out low; that is, below the standard altitude, and slow, slower than the 100 knots or 90 knots that the aircraft should have been at." Witnesses also testified that Ensign Knowlton made an early crosswind turn; this early turn prompted two radio transmissions. Captain Charles E. Guthrie, a flight instructor riding in another aircraft in the pattern, cautioned Lieutenant Commander Rainey:[3] "Aircraft turning crosswind, you're cutting somebody out." Similarly, Lieutenant Colonel David I. Habermacher, Jr., a flight instructor in the aircraft forced out of the pattern, transmitted the warning: "Aircraft turning crosswind, you're cutting us out. Heads up."

Lieutenant Commander Rainey did not verbally respond to these radio transmissions. Witnesses testified, however, that following these transmissions Lieutenant Commander Rainey's aircraft banked sharply to the right. While the threatened midair collision with Lieutenant Colonel Habermacher's aircraft was thus avoided, the aircraft piloted by Lieutenant Commander Rainey rapidly lost altitude, crashed in a wooded area two miles southeast of Middleton Field, and burned. Neither Lieutenant Commander Rainey nor Ensign Knowlton survived the crash.

On July 14, 1982 Lieutenant Colonel Habermacher directed Lieutenant Commander William C. Morgan, Jr. to

3. It is, of course, impossible to determine whether Lieutenant Commander Rainey or Ensign Knowlton was in control of the aircraft at this time. Witnesses knowledgeable in flight instruction, however, testified that Lieutenant Commander Rainey, a trained pilot and flight instructor, would, under these circumstances, assume control over the aircraft.

conduct an informal investigation into the circumstances surrounding the crash. On September 1, 1982 Lieutenant Commander Morgan reported, in writing, his findings of fact, opinions and recommendations pursuant to the requirements established by the Judge Advocate General. Lieutenant Commander Morgan's report lists as an opinion that pilot error was "[t]he most probable cause of the accident."

Rainey and Knowlton disagree with Lieutenant Commander Morgan's opinion. In a letter written to Lieutenant Commander Morgan about the "aircraft mishap," Rainey, also a flight instructor with the United States Navy, concluded that the mishap was not the result of pilot error but more probably "caused by some form of pneumatic sensing/fuel flow malfunction, probably in the fuel control unit." According to Rainey, this malfunction prompted an inflight "power interruption" or "rollback" making it impossible for Lieutenant Commander Rainey to sustain sufficient power to maintain flight. Knowlton agreed with Rainey's conclusion and on April 15, 1983 Rainey and Knowlton filed separate suits in the United States District Court for the Northern District of Florida, alleging negligence and strict product liability causes of action. Beech Aircraft Corporation, the manufacturer of the T-34C Turbo-Mentor aircraft, Pratt and Whitney Canada, Inc., the manufacturer of the engine incorporated into the T-34C aircraft, and Beech Aerospace Services, Inc., the United States Navy's contract maintenance service for the T-34C aircraft, were named as defendants.

At trial, the only disputed issue was the cause of the fatal crash. Because both Lieutenant Commander Rainey

and Ensign Knowlton were not available to testify and because the aircraft was almost totally destroyed by fire, the parties relied heavily on opinions developed by expert witnesses. The defendants also relied on the opinions contained in the investigative report prepared by Lieutenant Commander Morgan. Pointing to Lieutenant Commander Morgan's opinion that pilot error was the most probable cause of the crash, the defendants argued that they should not be held responsible. The jury agreed.

On August 1, 1984 Rainey and Knowlton, complaining about two of the trial judge's evidentiary rulings, filed a motion for a new trial.[4] The judge denied the motion. This appeal promptly followed.

II.

The district court admitted into evidence, over Rainey and Knowlton's objection, excerpts from the investigative report prepared by Lieutenant Commander Morgan.[5]

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4. Rainey and Knowlton objected to the admissibility of several opinions contained in Lieutenant Commander Morgan's investigative report. Rainey and Knowlton also objected to the restriction of Rainey's trial testimony. These objections are now raised on appeal.

5. On March 20, 1984, at the pretrial conference, the district court ruled that Lieutenant Commander Morgan's report was trustworthy and admissible but "only on its factual findings and would not be admissible insofar as any opinions or conclusions are concerned." On July 10, 1984, the day before trial, the district court reversed in part its prior ruling. At that time, the judge decided to admit into evidence the opinions and conclusions contained in the investigative report.

In light of the court's ruling, Rainey and Knowlton requested an opportunity to review Lieutenant Commander

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On appeal, Rainey and Knowlton argue that many of the excerpts from the investigative report, specifically Lieutenant Commander Morgan's opinions, should not have been admitted into evidence because these opinions did not fall within the public records exception to the general hearsay rule.[6]

To be admissible, the excerpts from Lieutenant Commander Morgan's report must satisfy the hearsay exception for public records and reports. *See* Fed.R.Evid. Rule 803(8) provides a hearsay exception in civil actions for "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources

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Morgan's report and "leave, in the event we so decide, to call as a witness such person or persons who might not have been called at this trial, but who could present evidence concerning that conclusion [that pilot error was the "most probable cause" of the crash] and the trustworthiness of it." The district court granted the request.

6. The following opinions were admitted into evidence:

> 1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.
>
> 2. There is no factual evidence of command or supervisory error.
>
> 3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.
>
> 4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.
>
> * * * * * *
>
> 7. The most probable cause of the accident was the pilots failure to maintain proper interval.

of information or other circumstances indicate lack of trustworthiness." Lieutenant Colonel Habermacher, with authorization from the Manual of the Judge Advocate General § 0902, at 9-3 to -5, appointed Lieutenant Commander Morgan to conduct an investigation into the circumstances surrounding the aircraft accident. Lieutenant Commander Morgan's report, since it was prepared in conjunction with an authorized Judge Advocate General investigation, is a public record. Moreover, because no evidence was introduced to show that the report lacked trustworthiness, we find that the report was indeed trustworthy.[7] Thus, the

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7. The Advisory Committee on the Proposed Rules notes that Fed.R.Evid. 803(8) "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present." Fed.R.Evid 803(8) advisory committee note. Thus, the burden was upon Rainey and Knowlton to show that the report was inadmissible because its sources of information or other relevant circumstances indicated a lack of trustworthiness. *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978) (citing *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir.1975)). That burden was not met here.

Rainey and Knowlton argue that they were unable to meet their burden because they were surprised by the district court's ruling the day before trial admitting into evidence Lieutenant Commander Morgan's opinions. But Rainey and Knowlton knew months before the trial that the defendants would seek to admit Lieutenant Commander Morgan's report into evidence. Still, Rainey and Knowlton made no effort to attack the qualifications of Lieutenant Commander Morgan or the methodology he employed in conducting the investigation. In fact, when the trustworthiness of the report was discussed during the pretrial conference, Rainey and Knowlton admitted that there was no evidence to indicate that the report was untrustworthy.

On July 10, 1984 when the judge decided to admit the opinions into evidence, he granted Rainey and Knowlton

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factual findings contained in the report are admissible under Rule 803(8).

Cases interpreting Rule 803(8), however, disclose a difference of opinion as to the meaning of "factual findings." *Compare Complaint of American Export Lines, Inc.*, 73 F.R.D. 454, 458 (S.D.N.Y. 1977) (evaluative conclusions or opinions are not "factual findings"); *with Complaint of Paducah Towing Co.*, 692 F.2d 412, 420 (6th Cir.1982) (evaluative reports are admissible as "factual findings" if based upon circumstantial evidence) (citation omitted).[8] In deciding how to interpret "factual findings" in the context of this case, we are bound by the Fifth

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leave to review the report and, if they so chose, to present evidence concerning the trustworthiness of the opinions. Rainey and Knowlton presented no such evidence, and did not seek a continuance.

Thus, in light of the fact that there was no evidence presented to show that the report lacked trustworthiness we agree with the district court in finding that the report was trustworthy.

8. The legislative history of the Rule reveals the origins of the conflict. The House Committee on the Judiciary intended that " 'factual findings' be strictly construed and that evaluations or conclusions contained in public reports shall not be admissible under this Rule." H.R.Rep. No. 93-650, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S.Code Cong. & Ad. News 7051, 7075, 7088. On the other hand, the Senate Committee on the Judiciary took "strong exception to this limiting understanding of the application of the rule." S.Rep. No. 93-1277, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S. Code Cong. & Ad.News 7051, 7064. The Senate Judiciary Committee recommended a liberal interpretation of "factual findings" so as to include "evaluative reports." *Id.* The Advisory Committee on the Proposed Rules also suggested that "factual findings" might encompass evaluative reports. *See* Fed.R.Evid. 803(8) advisory committee note.

Circuit's interpretation in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980).[9] In *Smith*, the Fifth Circuit considered the admissibility of a Coast Guard Marine Board of Investigation Report and found that the "evaluative conclusions and opinions of the Coast Guard Marine Board of Investigation contained in the report should not have been admitted into evidence." *Id.* at 222. The Fifth Circuit noted that:

> the language of Rule 803 suggests that "factual findings" defines something other than "opinions" and "diagnoses" which are admissible under Rule 803(6) when contained in the record of "a regularly conducted business activity." Rule 803(8), although similar to Rule 803(6), substitutes the term "factual findings" for "opinions" and "diagnoses." Since these terms are used in similar context within the same Rule, it is logical to assume that Congress intended that the terms have different and distinct meanings.

612 F.2d at 221-22 (citations omitted). Thus, while the defendants urge us to follow "[t]he prevailing view . . . that all evaluative conclusions are within the scope of Rule 803(8)(C)," *Walker v. Fairchild Industries*, 554 F.Supp. 650, 653 (D.Nev.1982) (citations omitted); *see also Cohen v. General Motors Corp.*, 534 F.Supp. 509, 512 (W.D.Mo. 1982) ("it appears that the more expansive reading [of Rule 803(8)] is gaining favor") (citations omitted), we are not free to do so. The Fifth Circuit in *Smith* clearly launched this court's precedent in a different direction, a direction we must follow. We therefore hold that the dis-

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9. The Eleventh Circuit, in *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

trict court erred in admitting into evidence the evaluative conclusions and opinions contained in Lieutenant Commander Morgan's report.

Having concluded that the district court erred in admitting into evidence these evaluative conclusions and opinions, we must now determine whether this error was harmless. *See Collins v. Wayne Corp.*, 621 F.2d 777, 782 (5th Cir.1980). We hold that it was not.

Several of Lieutenant Commander Morgan's opinions touched on the cause of the aircraft crash—the ultimate issue the jury was to decide. These opinions were submitted to the jury without ever having been tested by cross-examination. Moreover, the defendants were able to capitalize on the improper admission of these opinions by highlighting the opinions to the jury during closing argument. The jury returned a verdict for the defendants but the improper admission of Lieutenant Commander Morgan's opinions may have influenced this verdict. The admission of these opinions, therefore, cannot be considered harmless. The district court committed reversible error; Rainey and Knowlton must be afforded a new trial.

III.

Another issue raised by this appeal is whether the district court improperly restricted Rainey's trial testimony. A.H. Toothman, counsel for Beech Aircraft Corporation, called Rainey as an adverse witness. Rainey was questioned about the letter he had written to Lieutenant Commander Morgan about the "aircraft mishap." The questions concerned paragraphs two and four of the letter. In paragraph two, Rainey had written that before

the training exercise, his wife, Lieutenant Commander Rainey, was under "unnecessary" pressure. According to Rainey, his wife had attempted to cancel the exercise "[o]n three separate occasions," and "was observed to terminate [one] conversation in an uncharacteristically heated and disgusted manner." In paragraph four, Rainey had written that the aircraft piloted by his wife violated "pattern integrity . . . as it turned crosswind without proper interval." Rainey had also admitted that either his wife or Ensign Knowlton "react[ed] instinctively and abruptly by initiating a hard right turn, away from [the aircraft piloted by Lieutenant Colonel Habermacher]." Because these statements tended to support the defendants' theory that pilot error led to the crash, the district court, over Rainey and Knowlton's objection, permitted Mr. Toothman's inquiry.

During Rainey's cross-examination, however, the district court sustained the defendants' objection to the following question propounded by Dennis K. Larry, counsel for Rainey and Knowlton: "In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably [sic] primary cause of this mishap was rollback?" The district court did not allow the question, holding that the question improperly sought to elicit an opinion from a non-expert witness. On appeal, Rainey and Knowlton argue that the district court improperly excluded Rainey's testimony.[10] We agree.

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10. Federal Rule of Evidence 103(a)(2) cautions that error may not be predicated upon a ruling excluding evidence unless

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A district court's evidentiary rulings are discretionary and "will not be disturbed on appeal absent a clear showing of an abuse of discretion." *United States v. Russell,* 703 F.2d 1243, 1249 (11th Cir.1983) (citations omitted). Under this standard, we must conclude that the district court committed reversible error in limiting Rainey's testimony.

Federal Rule of Evidence 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106 is based on the "rule of completeness," and seeks to avoid the unfairness inherent in "the misleading impression created by taking matters out of context."[11] Fed.R.Evid. 106 advisory committee note.

Here, Rainey was questioned about a letter he had written to Lieutenant Commander Morgan. The defen-

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"the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." *United States v. Winkle,* 587 F.2d 705, 710 (5th Cir.) (quoting Fed.R.Evid. 103(a)(2), *cert. denied,* 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979)); *see also* 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 103[03] (1985). While Rainey and Knowlton failed to make an offer of proof indicating the substance of Rainey's excluded testimony, the substance of the testimony was readily apparent from the language of the question the defendants objected to.

11. Technically, Rule 106 is limited in its application to instances when a party introduces a writing or recorded statement into evidence. Here, we find the defendants' questions concerning Rainey's letter tantamount to the introduction of the letter into evidence. We therefore apply the concerns of the Rule—fairness and completeness—to this case.

dants questioned Rainey about several statements in this letter that, in isolation, seemed to support the defendants' position that pilot error caused the crash. Mr. Larry, counsel for Rainey and Knowlton, sought to place these statements in perspective by questioning Rainey about paragraph five of the letter. In paragraph five, Rainey had concluded that "[t]he most probale [sic] primary cause factor of this aircraft mishap is a loss of useful power (or rollback) caused by some form of pneumatic sensing/fuel flow malfunction." This statement would have placed the prior statements in context and clearly rebutted the misleading impression created by the prior statements alone.

The court, therefore, erred in permitting the defendants to examine Rainey about portions of his letter while prohibiting cross-examination about other relevant portions.[12] Because paragraph five of the letter would have harmonized the prior statements with Rainey's stance at trial, the jury was given an incomplete and misleading impression of Rainey's position. Under the "rule of com-

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12. The district court's limitation of Rainey's testimony was erroneous for another reason as well. As Rainey and Knowlton noted ,the district court permitted the defendant's inquiry into Rainey's letter, finding the statements in the letter admissible against Rainey as a prior inconsistent statement under Fed.R.Evid 801(d)(1)(A) and admissible against Knowlton as an adoptive admission under Fed.R.Evid. 801(d)(2)(B). Mr. Larry sought to question Rainey about paragraph five of the letter. Rainey and Knowlton contend that Rainey's statement in paragraph five should have been ruled admissible under Fed.R.Evid. 801(a)(1)(B) as "a prior consistent statement made by him offered to rebut an implied or express charge that in other parts or his letter he had made statements inconsistent with his trial theory." Brief for Appellants at 28-29. We agree.

pleteness'' embodied in Rule 106, the limitation of Rainey's testimony was thus inherently unfair and an abuse of discretion. Rainey and Knowlton are entitled to a new trial.

IV.

We hold that the trial judge committed reversible error in 1) admitting into evidence the evaluative conclusions and opinions contained in Lieutenant Commander Morgan's investigative report and 2) limiting Rainey's trial testimony. We therefore reverse the judgment entered against Rainey and Knowlton and remand for a new trial.

REVERSED AND REMANDED.

JOHNSON, Circuit Judge, concurring specially:

I concur with the panel's opinion in this case. I write separately to urge that, while we are clearly bound by *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980), to hold that the evaluative conclusions contained in Lieutenant Commander Morgan's report are not admissible under Fed.R.Evid. 803(8)(c), our interpretation of this rule is ripe for reconsideration.

Smith is an anomaly among the circuits. The majority view favors broad admissibility under Rule 803(8)(c)'s "factual findings" standard. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-301 (4th Cir.1984) ("[I]t is well established that the phrase should be interpreted broadly"). Weinstein's evidence treatise advocates such a reading, *Weinstein on Evidence* § 803(8)[03] (1985) ("[i]f the report states a conclusion that would be helpful—and is reliable—it should be admitted"), and

the Advisory Committee's Note may be read as consonant with this interpretation, *id.*

Broad admissibility releases trial judges from the duty to draw sometimes arbitrary lines between fact and opinion, and focuses the court's inquiry instead on the trustworthiness and relevance of the reports in question. This case presents an appropriate opportunity for reconsideration of this critical evidentiary issue by the full Court.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NOS. 84-3625, 84-3626

Order Granting Rehearing En Banc
791 F.2d 833 dated May 27, 1986

John C. RAINEY, Individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft of Canada, Ltd., Defendants-Appellees,

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

United States Court of Appeals
Eleventh Circuit.

May 27, 1986.

Appeals from the United States District Court for the Northern District of Florida; Winston E. Arnow, Judge.

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

(Opinion March 25, 1986, 11th Cir., 1986, 784 F.2d 1523)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active serving having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc.

IT IS ORDERED that the above-consolidated causes shall be reheard by this Court en banc *without* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs. The previous panel's opinion is hereby VACATED.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NOS. 84-3625, 84-3626

September 22, 1987 En Banc Opinion
827 F.2d 1498

John C. Rainey, Individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

United States Court of Appeals,
Eleventh Circuit.

Sept. 22, 1987.

Appeals from the United States District Court for the Northern District of Florida.

Before RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDMONDSON, Circuit Judges.

PER CURIAM:

This case was taken *en banc* for the purpose of reconsidering controlling authority in this Circuit concern-

ing the admissibility in evidence of an opinion expressed in an investigative report of an airplane crash. The Court is evenly divided on the issue, however, so that the controlling authority remains as set forth in the panel decision. Since the Court is unanimous in upholding the panel's decision on the other evidentiary issue which requires a reversal for a new trial, the effect of this *en banc* procedure is to reinstate the panel opinion. *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523 (11th Cir.1986). This opinion will simply review the case and the effect of this decision.

Lieutenant Commander Barbara Ann Rainey, a flight instructor with the United States Navy, and her student, Ensign Donald Bruce Knowlton, died on July 13, 1982 in a fiery airplane crash while practicing landings and takeoffs at Middleton Field, Alabama. Their spouses, John Charles Rainey ("Rainey") and Rondi M. Knowlton ("Knowlton") sought money damages under the Florida Wrongful Death Act, Fla.Stat.Ann. § 768.16-.27 in district court. The jury returned a verdict against the plaintiffs.

At trial, the only disputed issue was the cause of the fatal crash. Lieutenant Colonel David I. Habermacher, Jr., with authorization from the Manual of the Judge Advocate General § 0902, at 9-3 to -5, appointed Lieutenant Commander William C. Morgan, Jr. to conduct an investigation into the circumstances surrounding the aircraft accident. Lieutenant Commander Morgan's report, since it was prepared in conjunction with an authorized Judge Advocate General investigation, is a public record. Because no evidence was introduced to show that the report lacked trustworthiness, the factual findings contained in

the report are admissible under Rule 803(8). *Rainey*, 784 F.2d at 1527. In his report, however, Morgan also gave his opinion that pilot error was "[t]he most probable cause of the accident." *Id.* at 1526.

Rainey and Knowlton disagreed with Lieutenant Commander Morgan's opinion. In a letter written to Morgan about the "aircraft mishap," Rainey, also a flight instructor with the United States Navy, concluded that the mishap was not the result of pilot error but more probably "caused by some form of pneumatic sensing/fuel flow malfunction, probably in the fuel control unit." According to Rainey, this malfunction prompted an inflight "power interruption" or "rollback" making it impossible for Lieutenant Commander Rainey to sustain sufficient power to maintain flight.

Because the two people in the plane were killed and the aircraft was almost totally destroyed by fire, the parties relied heavily on opinions developed by expert witnesses. The defendants offered into evidence the opinion contained in the investigative report prepared by Lieutenant Commander Morgan.

Two points are raised on appeal. *First*, plaintiffs contend that John Charles Rainey's testimony was unduly restricted on cross-examination by his own attorney about his letter to Morgan after counsel for Beech Aircraft Corporation had called Rainey as an adverse witness. The panel opinion fully sets forth the circumstances concerning this issue and concludes the district court should be reversed for two reasons: (1) Fed.R.Evid. 106 requires the court to let Rainey testify as to the whole letter and, (2) the testimony was admissible under Fed.R.Evid. 801

(d)(1)(B). *Rainey*, 784 F.2d 1528-30. The Court is unanimous in concluding that the panel opinion is correct in reasoning and result, so no further discussion of the issue is in order here.

Second, Rainey and Knowlton appeal the district court's decision to admit into evidence, over their objection, the opinion as to cause of the accident in the investigative report prepared by Lieutenant Commander Morgan. Morgan did not testify at the trial. The panel held that prior precedent of this Court, found in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980), requires that the district court be reversed on this point. *Rainey*, 784 F.2d at 1527-28. *Smith* holds that "evaluative conclusions and opinions," such as those contained in Lieutenant Commander Morgan's report, are not admissible. 612 F.2d at 221-22. The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. Judge Johnson specially concurred in the panel opinion, noting that although *Smith* controlled the panel decision, it should be reconsidered *en banc*. *Rainey*, 784 F.2d at 1530.

Although this case was taken *en banc* for the purpose of reconsidering the evidentiary issue decided in *Smith*, the Court is evenly divided on the point. Judges Roney, Godbold, Hill, Fay, Vance and Clark would all adhere to *Smith*. Judges Tjoflat, Kravitch, Johnson, Hatchett, Anderson and Edmondson would follow the reasoning suggested in Judge Johnson's concurring opinion and overrule *Smith*.

Since the Court is evenly divided, there is no useful purpose in the publication of opinions setting forth the reasoning of either view. All judges agree that unless *Smith* is changed by the *en banc* court, it controls the issue in the district court. Since it takes a majority of the *en banc* court to change a prior precedent of this Court, *Smith* controls and the panel opinion properly decides the issue.

REVERSED and REMANDED.

TJOFLAT, Circuit Judge, specially concurring:

I concur in the en banc court's judgment in this case, reversing the district court because it improperly restricted the cross-examination of John Charles Rainey. The second issue in this case is whether the evaluative conclusions contained in Lieutenant Commander (LCDR) Morgan's investigative report are admissible under Fed.R.Evid. 803(8)(C).[1] I write separately to urge the court to take its place among the majority of our sister circuits, favoring broad admissibility under Rule 803(8)(C)'s "factual

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1. Fed.R.Evid. 803(8)(C) provides as follows:

   Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

   The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

   . . . .

   (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

findings" standard. Were we to adopt the majority view, I submit that we would hold that the district court in this case properly admitted the evaluative conclusions contained in the investigative report.

I.

On July 13, 1982, LCDR Barbara Ann Rainey, a flight instructor with the United States Navy, and her student, Ensign (ENS) Donald Bruce Knowlton, died in a fiery airplane crash while practicing "touch and go" landings and takeoffs[2] at Middleton Field in Alabama. The day after the crash, Lieutenant Colonel (LCOL) Habermacher of the United States Marine Corps, the Commanding Officer of LCDR Rainey's training squadron, under authority of the Manual of the Judge Advocate General § 0902, at 9-3 to 9-5, appointed LCDR William C. Morgan, Jr., to investigate the aircraft accident.[3]

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2. A "touch and go" pattern is a training exercise in which, after takeoff, the student circles the airfield in an oval pattern and then lands the aircraft; after landing, the student does not stop the plane but instead accelerates and takes off again.

3. The letter appointing LCDR Morgan to investigate the crash reads, in full, as follows:

   From: Commanding Officer, Training Squadron THREE
   To: LCDR William C. MORGAN, Jr., USN, 1310

   Subj: Investigation to Inquire into the Circumstances Connected with the Aircraft Accident which occurred at approximately 1020, 13 July 1982, approximately two miles southeast of Middleton Airport in Evergreen, Alabama.

   Ref: (a) JAG Manual Chapter VI and Section 0902, Chapter IX

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On September 1, 1982, LCDR Morgan, pursuant to the requirements established by the Judge Advocate General, filed a written report with LCOL Habermacher. Accompanying LCDR Morgan's investigative report were sixty documents, termed "enclosures," consisting of 159 pages. The enclosures included the following documents: sum-

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1. You are appointed to conduct an informal investigation in accordance with reference (a), as soon hereafter as practicable, for the purpose of inquiring into all circumstances surrounding the aforementioned accident.

2. You will conduct a thorough investigation into all the circumstances surronding [sic] the accident and report your findings of fact, opinions and recommendations as to the following:

a. The cause of the accident.

b. The possibility of administrative or disciplinary action.

c. Any claims for or against the U.S. Navy resulting therefrom.

d. Be advised that no statement taken by you need be subscribed under oath.

3. By copy of this appointing letter, the squadron Administrative Department is directed to furnish you assistance in preparing the report of your investigation.

4. This report will be completed not later than 13 August 1982. If additional time is required, you will submit in writing to the Commanding Officer the reasons for and the amount of additional time required.

/s/ D.I. HABERMACHER, JR.

On August 12, 1982, LCDR Morgan "requested that the due date for the informal investigation directed by reference (a) be extended for 14 days subsequent to the receipt of the autopsy protocol and toxicology reports and the results of the engineering investigation." On August 13, 1982, LCOL Habermacher approved LCDR Morgan's request.

maries of LCDR Rainey's naval flight and medical records and of Ensign Knowlton's aviation and medical records; Training Squadron Three's flight schedule for July 13, 1982; history and inspection records, including an outstanding maintenance action form, of the aircraft that crashed; air traffic control records; statements from the other instructors and students who were engaged in the "touch and go" exercise, as well as statements from other witnesses to the crash; crash crew rescue reports; aerial photographs of the crash site; casualty reports; the engineering investigative report on the aircraft's engine; photographs of the plane's wreckage; statement from the spouses of the crash victims; diagram of the Middleton Field traffic pattern; and copies of the autopsy protocol and toxicology reports of LCDR Rainey and ENS Knowlton. Based on the sixty enclosures and on his investigation, LCDR Morgan prepared a six-page summary, including a preliminary statement, findings of fact, opinions, and recommendations. That summary is reproduced here in full:

PRELIMINARY STATEMENT

1. As directed by enclosure (1) and in accordance with reference (a), an informal investigation was conducted into the circumstances surrounding the aircraft accident which occurred Southeast of Middleton Airport near Evergreen, Alabama, on 13 July 1982.

2. All reasonably obtainable evidence has been compiled and examined during the course of the investigation and all directives of the convening authority have been met. Certain real evidence collected by the Aircraft Accident

Board was also obtained, however, considerable care was taken to ensure a separate and accurate investigation.

3. All claims and potential claims for damages by landowners have been investigated. The original claim of Mr. William W. Ward has been hand carried to Naval Legal Service, Pensacola, Florida. No estimates were required with this claim based on a phone conversation with LCDR G.F. Indest of the Naval Legal Service in Pensacola, Florida. The other property owner involved, Mr. Roger Warrick of Gauiter, Mississippi, has been notified of the accident and furnished Standard Form 95 by registered mail.

4. Several witnesses were found that heard the radio transmissions and saw the aircraft just prior to the crash. They all seemed rational and observant. Witnesses interviewed were not designated as parties to the investigation and all were advised of the nature of the JAG investigation.

5. The unusual length of time required to complete this investigation was due to the delay in receiving the autopsy reports on the two pilots and the delay in receiving the engineering investigation on the engine of aircraft 3E955. Additional delays were due to the research required to validate points brought out in the engineering investigation.

FINDING OF FACT

1. At approximately 1020 local on 13 July 1982, a U.S. Navy T-34C aircraft, bureau number 160955, piloted by LCDR Barbara A. Rainey crashed approximately two miles Southeast of Middleton Airport near Evergreen, Alabama, (enclosure (3)).

2. LCDR Barbara A. Rainey, 558-72-0652, USNR, reported to Training Squadron THREE on 16 November 1981, (enclosure (4)). At the time of the accident LCDR Rainey was fully NATOPS qualified (Naval Air Training and Operation Procedures Standardization Program) and Instrument qualified (enclosure (5)) as well as being a qualified familiarization instructor, (enclosure (6)). As of 12 July 1982, LCDR Rainey had accumulated 1331 total flight hours of which 209 were logged in the T-34C aircraft. LCDR Rainey had logged 96.2 hours during the 90 days preceeding [sic] the accident, (enclosure (7)). LCDR Rainey's Aviator's Log Book indicated no record of previous accidents or flight violations, (enclosure (8)).

3. ENS Donald B. Knowlton, 548-04-6268, USNR, was on active duty and checked into Training Squadron THREE on 24 May 1982 for duty as a Student Naval Aviator, (enclosure (9)). He had an average flight grade of 2.94 and had accumulated 4.5 hours in the T-34C aircraft, (enclosure (10)).

4. LCDR Rainey was physically qualified for flight duty and was in a flight status on 13 July 1982, (enclosure (11)).

5. ENS Knowlton was physically qualified for flight duty and was in a flight status on 13 July 1982, (enclosure (12)).

6. LCDR Rainey and ENS Knowlton were scheduled to fly Familiarization Flight Four at 0645 on 13 July 1982 by Training Squadron THREE's flight schedule authorizing the flight, (enclosure (13)).

7. Aircraft 160955, a T-34C, was accepted by the Navy on 26 September 1978. Inspection of the aircraft records,

history, and logs revealed that all required maintenance inspections and technical directives had been complied with, (enclosure (14)). There was one outstanding discrepancy, the air-conditioning ground blower door spring was broken, (enclosure (15)).

8. Aircraft Technical Directive No. T-34C-017 which was designed to provide a manual back-up system for fuel metering, (enclosure (16)), was not installed, (enclosure (14)). Although much has been written about the need for a manual fuel control, (enclosures (17), (18), (19), (20) and (21)), it is still not installed in the T-34C aircraft, (enclosure (14)).

9. LCDR Rainey and ENS Knowlton were issued aircraft 160955 and LCDR Rainey signed the acceptance sheet thereby assuming the responsibility of pilot in command, (enclosure (22)).

10. Review of North Whiting Tower traffic control strips for 13 July 1982 show that aircraft 160955 (3E955) departed North Whiting Field at 0915 local under VFR conditions, (enclosure 23)).

11. The weather observed indicated no conditions that would have a direct effect on the flight, (enclosure (24)). Weather in the Middleton pattern was excellent with no clouds, visibility 5 miles or more, and winds light and from the south, (enclosures (25), (26), (27) and (28)).

12. At approximately 1001, 3E955 entered the pattern at Middleton Field for Runway 18. At least four approaches were flown with a minimum of two "touch and go's" completed prior to the accident, (enclosure (28)).

13. At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned, (enclosures (25), (27), (29), (30), (31) and (32)).

14. Upon receiving notification of a crash and seeing smoke to the southeast of Middleton Field, the crash crew immediately began transit to the crash site, (enclosures (27), (28) and (29)).

15. The [wreckage] of 3E955 crashed into a farmer's field of cutover timber with scattered trees in the area. The area has slightly rolling hills with a small dirt road passing near the crash site, (enclosure (41)).

16. 3E955 crashed on property owned by Mr. Roger Warrick. Transit to the crash site required that the crash crew and other vehicles cross property owned by Mr. William W. Ward, (enclosure (42)).

17. During transit to the crash site, the crash crew had difficulty in locating the [wreckage] due to the muddy road conditions and the circuitous route required to go around a small stream and follen [sic] trees. Additionally, there were no current, detailed maps of the local area available to the crash crew. 3E467, piloted by LCDR Richard E. Blake, was over the crash site and assumed on scene command and attempted to direct the crash crew to the [wreckage], (enclosures (27), (28), (31) and (33)).

18. ABHI R.S. Scribner stated that at approximately 1022 local, he stopped the crash truck and picked up a civilian who assisted in locating the [wreckage] of 3E955, (enclosure (28)).

19. LT Ted J. Choley stated that at approximately 1030 local, he received a call from LT Will Carpenter on base radio stating that there was an accident at Middleton Field, (enclosure (36)).

20. At 1035 local, North Whiting Field operations was notified of a possible aircraft accident near Middleton Field, (enclosure (37)).

21. Upon arrival at the [wreckage] at 1040 local, the crash crew immediately began efforts to extinguish the fire using AFFF (lite water) and attempted to locate survivors. No response was heard to ABHI Scribner's call to crewmembers of the aircraft. The burned bodies of both pilots were noted at this time, (enclosures (27), (28), (34) and (35)).

22. When all the AFFF (lite water) on the truck was depleted, the crash crew used all of the portable fire extinguishers on the truck in an attempt to put out the fire. When this failed, they resorted to shoveling dirt on the fire in an attempt to smother it, (enclosures (27), (28), (31), (34) and (35)). At 1042 local, all fires were extinguished with the exception of a magnesium fire which the crash crew was unable to put out, (enclosure (38)).

23. LCDR Rainey sustained a lethal neck injury at impact but bodily functions continued for an undetermined period, (enclosures (52) and (55)).

24. ENS Knowlton was killed instantly due to massive head injuries sustained at impact, (enclosures (52) and (56)).

25. At some undetermined point in the crash sequence, the rotary buckle holding the shoulder straps of the from [sic] cockpit harness failed, (enclosure (50)).

26. At some point during the flight or the subsequent crash, a LPA (life preserver assembly) inflation lever was moved to the activated position, (enclosure (51)).

27. At the time of impact, the engine of 3E955 was operating but was operating at reduced power, (enclosure (48)).

28. At 1050 local, HT-18 launched aircraft 171 as a SAR (search and rescue) mission to Middleton Field, (enclosure (39)). The aircraft arrived at the crash site at 1125 local and assumed on scene command from 3E467. 3E467 was relieved from communications relay duties at 1130 local, (enclosure (33)).

29. Upon landing at the site, the crew of aircraft 171 was informed that there were no survivors, (enclosures (43), (44) and (45)).

30. At 1050 local, HC-16 was notified by phone of an aircraft accident near Middleton Field. At 1105 local, a UH-1N launched and proceeded to the crash site, arriving there at 1150 local. Upon landing, HC-16 was requested to transport the bodies of the victims to NARMC (Naval Aerospace Regional Medical Center). The remains of the pilots were removed from the [wreckage], placed in body bags, and moved to the helicopter. Takeoff from the crash site was at 1430 local, and arrival at NARMC was at 1515 local. The remains were taken from the helicopter and placed in an ambulance for transportation to the hospital, (enclosure (40)).

31. An Engineering Investigation was conducted on the engine of aircraft 160955 by the Naval Air Rework Facility, NAS Pensacola, Florida, (enclosure (48)).

OPINIONS

1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

5. Because both pilots were killed in the crash and because of the nearly total destruction of the aircraft by fire, it is almost impossible to determine exactly what happened to Navy 3E955 from the time it left the runway on its last touch and go until it impacted the ground. However, from evidence available and the information gained from eyewitnesses, a possible scenario can be constructed as follows:

a. 3E955 entered the Middleton pattern with ENS Knowlton at the controls attempting to make normal landings.

b. After two unsuccessful attempts, LCDR Rainey took the aircraft and demonstrated two landings "on the numbers". After getting the aircraft safely airborne from the touch and go, LCDR Rainey transferred control to ENS Knowlton.

c. Due to his physical strength, ENS Knowlton did not trim down elevator as the aircraft accelerated toward 100 knots; in fact, due to his inexperience, he may have trimmed incorrectly, putting in more up elevator.

d. As ENS Knowlton was climbing to pattern altitude, he did not see the aircraft established on downwind so he began his crosswind turn. Due to ENS Knowlton's large size, LCDR Rainey was unable to see the conflicting traffic.

e. Hearing the first call, LCDR Rainey probably cautioned ENS Knowlton to check for traffic. Hearing the second call, she took immediate action and told ENS Knowlton she had the aircraft as she initiated a turn toward an upwind heading.

f. As the aircraft was rolling from a climbing left turn to a climbing right turn, ENS Knowlton released the stick letting the up elevator trim take effect causing the nose of the aircraft to pitch abruptly up.

g. The large angle of bank used trying to maneuver for aircraft separation coupled with the abrupt pitch up caused the aircraft to stall. As the aircraft stalled and went into a nose low attitude, LCDR Raney reduced the PCL (power control lever) toward idle. As she was rolling toward wings level, she advanced the PCL to maximum to stop the loss of altitude but due to the 2 to 4 second lag in engine response, the aircraft impacted the ground before power was available.

6. Although the above sequence of events is the most likely to have occurred, it does not change the possibility that a "rollback" did occur.

7. The most probable cause of the accident was the pilots [sic] failure to maintain proper interval [between LCDR Rainey's aircraft and another aircraft in the pattern].

8. There are many items that are considered as possible contributing factors to the accident. They are listed as follows:

a. The design of the aircraft which limits forward visability [sic] when in a climb.

b. The performance of the engine from idle to max power and the associated lag.

c. The relative size of the individuals, ENS Knowlton's size and strength could enable him to overpower LCDR Rainey in a panic situation.

d. The possibility that an LPA (life preserver assembly) was inflated at a critical time.

e. The inability of early stage students to trim correctly.

9. The Middleton Crash Crew and the RDO (Runway Duty Officer) acted in a very professional manner.

RECOMMENDATIONS

1. That the claim of Mr. William W. Ward be honored.

2. That a flight for the NATOPS syllabus be designed to familiarize all pilots with the different type stalls that may be encountered.

3. That landing lights be used in the landing pattern to enhance visibility of aircraft established downwind.

4. That every effort be made to incorporate Aircraft Technical Directive No. T-34C-0147 at the earliest possible date.

/s/ W.C. Morgan, Jr.

In letters to the Judge Advocate General of the United States Navy, the following officers endorsed LCDR Morgan's investigative report: the Commanding Officer of Training Squadron Three (LCOL Habermacher), the Commanding Officer of Training Squadron Five, the Chief of Naval Education and Training, and the Chief of Naval Operations. In addition, two other officers sent endorsement letters to LCOL Habermacher. Although a few endorsers took issue with some of LCDR Morgan's recommendations, none disagreed with any of his opinions that were admitted into evidence.

Disagreeing with LCDR Morgan's opinion that pilot error was "[t]he most probable cause of the accident," the spouses of the crash victims, John Charles Rainey and Rondi M. Knowlton, filed separate suits on April 15, 1983 in the district court against the manufacturer of the aircraft, Beech Aircraft Corporation, the manufacturer of the aircraft's engine, Pratt & Whitney Canada, Inc., and the Navy's contract maintenance service for the aircraft, Beech Aerospace Services, Inc.[4] Each plaintiff alleged negligence and strict product liability causes of action and

4. Rainey brought suit individually, as the personal representative of his wife's estate, and on behalf of his minor children, Cynthia Ann Rainey and Katharine Marie Rainey. Knowlton brought suit individually, as the personal representative of her husband's estate, and on behalf of her minor children, Ramsey Nia Knowlton and Branigan McDermott Knowlton.

sought money damages under the Florida Wrongful Death Act, Fla.Stat. §§ 768.16-.27 (1985). Specifically, Rainey and Knowlton each alleged that "[t]he aircraft and engine were equipped with a pneumatic fuel control system which was defective in its design and/or manufacture in that it was prone to malfunction in such [a] way as to cause 'power interruptions' . . . such that the pilot of the subject aircraft was unable to sustain sufficient power to maintain flight." The spouses alleged that Beech Aircraft and Pratt & Whitney were negligent in designing and manufacturing the aircraft and engine in that they knew or should have known of the defects; they alleged that Beech Aerospace Services, Inc. was negligent when it issued to LCDR Rainey an aircraft that it knew or should have known had a defective fuel control system. Both Rainey and Knowlton sought punitive damages against the defendants, contending that they acted "in reckless disregard for the safety of decedent and other persons who they knew would fly the aircraft." At a pretrial conference on March 20, 1984, the district court granted Beech Aircraft Corporation's motion to consolidate the two cases for all purposes, including trial.

During that same pretrial conference, the district court held that LCDR Morgan's investigative report was trustworthy and that his factual findings, but not his opinions or conclusions, would be admissible. On July 10, 1984, during a hearing held the day before trial, the district court reversed in part its prior ruling on the admissibility of LCDR Morgan's report. The court reiterated that "the defendants [could] place in evidence before the Jury the findings of facts, 31 in number, that were in the JAG report." The court further held "that the opinions attached

to those 31 findings may also be admitted, to the extent that they are opinions and conclusions." According to the district court, however, not every "opinion" in LCDR Morgan's report was admissible under Fed.R.Evid. 803 (8)(C):

> Paragraph five is nothing but a possible scenario, as it's called, and would not be allowed in. Paragraph eight talks about possible contributing factors and it would not be allowed in. Paragraph nine, which says somebody acted in a very professional manner, would not be allowed in because it is not relevant.

Accordingly, the district court held that paragraphs five, eight, and nine of the report's "opinions" section would not be allowed into evidence at trial.[5]

The plaintiffs objected to the district court's new ruling on the admissibility of the JAG report, citing *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980).[6] In light of the court's ruling, the plaintiffs requested an opportunity to review the JAG report for the purpose of offering evidence and witnesses relating to LCDR Morgan's "Opinion" No. 7 (which appears to be based on "Finding of Fact" No. 13): "The most probable cause of the accident was the pilots [sic] failure to maintain proper interval." The district court granted the plaintiffs' request.

The only disputed issue at trial was the cause of the fatal crash. The parties relied heavily on opinions of ex-

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5. *See infra* note 7.

6. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

pert witnesses. The defendants relied in part on excerpts from the opinions contained in LCDR Morgan's investigative report.[7] The following "opinions" from that report were admitted into evidence:

> 1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.
>
> 2. There is no factual evidence of command or supervisory error.
>
> 3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, sociologically [sic], or mentally prepared to complete their flight.
>
> 4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.
>
> . . . .

7. The trial exhibits are not part of the record on appeal. Although the court has before it a complete copy of LCDR Morgan's investigative report, which presumably was included in the record on appeal as an exhibit to a memorandum filed in support of a motion, I can only assume, as the parties agree, that the portions of the report that the district court on July 10, 1984 ruled would be admissible at trial were actually admitted into evidence. I therefore assume that all 31 of the report's findings of fact were admitted into evidence, along with all of the report's opinions except paragraphs five, eight, and nine. (I also assume that the district court struck the opinion in paragraph six, which deals with the possibility that a "rollback" caused the accident, because that opinion can only be read along with paragraph five, which the district court explicitly held inadmissible during the July 10, 1984 pretrial conference.) Additionally, a colloquy between the trial judge and the parties' lawyers, outside the presence of the jury, indicates that the court also admitted into evidence the maintenance record of the plane that crashed; that record was attached to LCDR Morgan's report.

> 7. The most probable cause of the accident was the pilots [sic] failure to maintain proper interval.

On July 20, 1984, the jury returned a verdict for the defendants, finding that the deaths of LCDR Rainey and ENS Knowlton were not legally caused by the aircraft's fuel control system, and that there was no negligence on the part of Beech Aircraft, Pratt & Whitney, or Beech Aerospace that legally caused the deaths of LCDR Rainey and ENS Knowlton.

On August 1, 1984, the plaintiffs filed a motion for a new trial, challenging two of the trial judge's evidentiary rulings. The district court denied the motion, and this appeal followed.

A panel of this court reversed the district court, holding that the district court improperly restricted plaintiff Rainey's trial testimony and that it improperly admitted into evidence, contrary to precedent of this court found in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980), the opinions contained in LCDR Morgan's investigative report. We took the case en banc to consider both evidentiary issues, thereby vacating the panel's opinion and judgment by operation of law. *See* 11th Cir.R. 26(k). I write now to urge that the en banc court reject the holding of *Smith* and affirm the district court's ruling admitting into evidence the opinions contained in LCDR Morgan's investigative report.

II.

To be admissible, an investigative report of the sort prepared by LCDR Morgan must satisfy the hearsay exception for public records and reports found in Fed.R.

Evid. 803(8)(C). That rule provides a hearsay exception for "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . in civil actions and proceedings . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Fed.R. Evid. 803(8)(C). As to the rule's public record requirement, the en banc court holds that LCDR Morgan's investigative report is a public record: it was prepared in conjunction with an authorized Judge Advocate General investigation.

As to the rules caveat that certain findings of a public record are admissible unless the sources of the information that lead to the findings or other circumstances indicate that such sources were untrustworthy, there is no evidence in the record that would indicate that the sources upon which LCDR Morgan relied lacked trustworthiness. The burden was on the plaintiffs to show that the report was inadmissible if they believed that its sources of information or other circumstances indicated that the report lacked trustworthiness. *See* Fed.R.Evid. 803(8) advisory committee's note (Rule 803(8) "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present"); *see also Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978) (citing *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir.1975)). Although the plaintiffs knew months before trial that the defendants would seek to admit LCDR Morgan's investigative report into evidence, they neither attacked the

qualifications of LCDR Morgan nor the methodology he employed. During the July 10, 1984 pretrial conference, the plaintiffs requested leave to review the report to determine whether to present evidence bearing on the trustworthiness of the report's opinions. The district court granted the plaintiffs' request, but they presented no evidence challenging the report's trustworthiness and did not seek a continuance to gather such evidence. The plaintiffs have not met their burden. For these reasons, this court cannot, and does not, set aside the district court's finding that the report is trustworthy.

The issue that divides us is whether "factual findings resulting from an investigation," Fed.R.Evid. 803(8)(C) encompass evaluative conclusions derived from the report. The panel that heard this appeal answered in the negative, concluding that it was bound by the former Fifth Circuit's interpretation of "factual findings" in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980). *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1527-28 (11th Cir.1986) (per curiam). In a separate concurring opinion, Judge Johnson described *Smith* as "an anomaly among the circuits" and urged the en banc court to reject the *Smith* court's reasoning and to adopt a rule favoring broad admissibility of evaluative conclusions contained in investigative reports that are trustworthy public records and are relevant to the issues in question. *See id.* at 1530 (Johnson, J., concurring specially). I agree with Judge Johnson.

III.

In *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980), the former Fifth Circuit considered the admissibility under

Fed.R.Evid. 803(8)(C) of excerpts from a Coast Guard Marine Board of Investigation Report. Acknowledging that the legislative history of the rule does not unambiguously resolve the issue and that the federal courts have disagreed over the appropriate interpretation of "factual findings," the *Smith* court reached this conclusion:

> [T]he language of Rule 803 suggests that "factual findings" defines something other than "opinions" and "diagnoses" which are admissible under Rule 803(6) when contained in the records of "a regularly conducted business activity." Rule 803(8), although similar to Rule 803(6), substitutes the term "factual findings" for "opinions" and "diagnoses." Since these terms are used in similar context within the same Rule, it is logical to assume that Congress intended that the terms have different and distinct meanings.

Id. at 221-22 (citing *Complaint of Am. Export Lines, Inc.*, 73 F.R.D. 454, 457 (S.D.N.Y.1977)).[8] Accordingly, the

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8. Fed.R.Evid. 803(6) provides as follows:

Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(6) Records of regularly conducted activity. A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledgeable, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, un-

(Continued on following page)

Smith court held that "evaluative conclusions and opinions of the Coast Guard Marine Board of Investigation contained in the report should not have been admitted into evidence." *Id.* at 222. In my view, the *Smith* court misinterpreted "factual findings" within the meaning of Rule 803(8)(C), unduly limiting the rule's scope.

A.

A literal reading of Rule 803(8)(C) hardly lends itself to a restrictive interpretation. The rule creates a hearsay exception for trustworthy public reports "setting forth . . . factual findings resulting from an investigation." Fairly read, the rule admits not merely "factual findings," but reports in their entirety, as long as the reports are trustworthy and contain factual findings. After all, this hearsay exception is entitled "public records and reports," not "factual findings set forth in public records." *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1143 (E.D.Pa.1980) ("The language of 803(8)(C) literally provides for the admission of entire agency reports so long as those reports include, *inter alia*, factual findings. . . ."), *aff'd in relevant part*, 723 F.2d 238 (3d Cir.1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The Advisory Committee Notes support this reading of the rule. The Committee couched its discussion in terms

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less the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

of the admissibility of evaluative reports.[9] Although the Committee understood that the rule "assumes admissibility in the first instance," it believed that the rule provides "ample provision for escape if sufficient negative factors are present." Fed.R.Evid. 803 advisory committee's note. The Committee offered a nonexclusive list of "[f]actors which may be of assistance in passing upon the admissibility of evaluative reports":

> (1) the timeliness of the investigation, McCormack, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, *id.*, (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co.*, 141 F.2d 568 (10th Cir.1944); (4) possible motivation problems suggested by *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943).

Fed.R.Evid. 803 advisory committee's note. Notably the Committee did not even mention the possibility that admissibility would be limited to those portions of evaluative reports that present "factual findings."

The House Judiciary Committee "approved Rule 803 (8) without substantive change from the form in which it was submitted by the [Supreme] Court." Report of the Committee on the Judiciary, H.R.Rep. No. 650, 93d Cong., 1st Sess. 14 (1973), *reprinted in* 1974 U.S.Code Cong. & Admin.News 7051, 7075, 7088. The Committee,

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9. Evaluative reports under Rule 803(8)(C) "are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case." Fed.R.Evid. 803 advisory committee's note.

however, adopted a somewhat tortured reading of the public records hearsay exception: "The Committee intends that the phrase 'factual findings' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule." *Id.* That reading is tortured not only because it erroneously focuses on the admissibility of factual findings contained in public reports, rather than on, as the Rule says, public records "setting forth . . . factual findings resulting from an investigation," but also because it contorted the meaning of "factual findings."

A "finding" is "[a] decision upon a question of fact reached as the result of a judicial examination or investigation by a court, jury, referee, coroner, etc." Black's Law Dictionary 569 (5th ed.1979). That is, a finding "commonly applies to the result reached by a judge or jury." *Id.* In other words, a "finding" or a "finding of fact" refers to the result or conclusion drawn by an investigator, whether it be a fire inspector, judge, or jury, "from facts without exercise of legal judgment." *Id.* The common meaning of finding therefore comports with investigative conclusions (i.e., results derived from the examination of facts), but not with idle speculation or legal conclusions: "a finding does not include legal conclusions that may have been reached by an investigator and is necessarily something more than a mere recitation of evidence, although we think the term is broad enough to encompass any statement of fact that represents a conclusion on the part of an investigator." *Zenith Radio Corp.*, 505 F.Supp. at 1144 (footnote omitted). Thus, by way of example, the following investigative (or evaluative) conclu-

sions are "factual findings": whether a traffic light was green or red (there were no eyewitnesses) moments before an automobile accident, *see Baker v. Elcona Homes Corp.*, 588 F.2d 551, 554-59 (6th Cir.1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979); whether a public school board had established and maintained an elementary school as a black school for segregative purposes, *see United States v. School Dist. of Ferndale*, 577 F.2d 1339, 1354-55 (6th Cir.1978); whether a state trooper who fatally shot a man who attacked him acted within the guidelines of the department's Policies and Procedures Manual, *see Perrin v. Anderson*, 784 F.2d 1040, 1046-47 (10th Cir.1986); whether a state trooper acted contrary to department training when he attempted to handcuff a person while holding a cocked weapon, *see Wilson v. Beebe*, 770 F.2d 578, 589-90 (6th Cir.1985) (en banc); whether a crewmember of a ship started a fight, *see Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1182-83 (3d Cir.), *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978); whether the captain of a tow boat acted reasonably in mooring the vessel and setting the watch, *see In re Paducah Towing Co.*, 692 F.2d 412, 419-21 (6th Cir. 1982); whether there is a statistically significant link between tampon use and toxic shock syndrome, *see Ellis v. International Playtex, Inc.*, 745 F.2d 292, 299-304 (4th Cir. 1984); and whether a phone company's tariffs were unreasonable and discriminatory, *see Litton Systems, Inc. v. AT & T*, 700 F.2d 785, 819 (2d Cir.1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984).

The Senate Judiciary Committee rejected the House Committee's narrow interpretation of "factual findings," opting instead for the Advisory Committee's view:

> The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."
>
> . . . .
>
> The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish[es] sufficient guidance on the admissibility of evaluative reports.

Report of the Committee on the Judiciary, S.Rep. No. 1277, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. Code Cong. & Admin.News 7051, 7064-65.[10]

The Conference Committee did not resolve the differing views of the term "factual findings." The Conference Committee Notes make no reference to the scope of Rule 803(8) or to the meaning of "factual findings." *See Notes of Conference Committee,* H.R. Conf.Rep. No. 1597, 93d Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Admin.News 7098; *see also Baker v. Elcona Homes Corp.,* 588 F.2d 551, 557 (6th Cir.1978), *cert. denied,* 441 U.S. 993, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979).

The legislative history as to the admissibility of evaluative conclusions is indeed equivocal. Nevertheless, the Senate's view is more consistent with the other hearsay exceptions and with the general spirit of the Federal Rules of Evidence, and is more easily justified on policy grounds. *See United States v. AT & T,* 498 F.Supp. 353, 359 (D.D.C.1980) ("Extrinsic materials indicate that the Rule is most appropriately considered by following the Senate Committee's position.").

Rule 803(6), the regular entries rule, creates a hearsay exception for reports or records "of acts, events, conditions, opinions, or diagnoses . . . if kept in the course of a regularly conducted business activity . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Fed.R. Evid. 803(6). Because Rule 803(6) uses the terms "opinions" and "diagnoses," whereas Rule 803(8)(C) uses the term "factual findings," the *Smith* court inferred that Congress must have intended that those terms have distinct meanings and, more specifically, that "factual findings" not encompass evaluative conclusions. *See Smith v. Ithaca Corp.,* 612 F.2d 215, 221-22 (5th Cir.1980). The *Smith* court reached this erroneous result, I believe, because it apparently gave no credence to the Advisory Committee's Note on Rule 803(6).

10. The Senate and House versions of Rule 803(8) differed slightly. The Senate version referred to another proposed rule, relating to the admissibility of certain criminal law enforcement records and reports. That reference was deleted by the Conference Committee, which adopted the House's version of the rule. *See* 4 J. Weinstein's & M. Berger, *Weinstein's Evidence* 803-23 (1985); *see also Baker v. Elcona Homes Corp.,* 588 F.2d 551, 557 n. 6 (6th Cir.1978), *cert. denied,* 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979).

Tracing the origins of the regular entires rule, the Advisory Committee noted that "[e]ntries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results." Fed.R.Evid. 803 advisory committee's note. The Committee acknowledged, however, that the Commonwealth Fund Act, 28 U.S.C. § 1732, the Uniform Business Records as Evidence Act, Model Code Rule 514, and Uniform Rule 63(13) contained limiting and ambiguous language with respect to diagnoses, test results, and opinions. Thus, according to the Advisory Committee, "[i]n order to make clear its adherence to the [trend toward freely admitting diagnostic entries,] the rule specifically includes both diagnoses and opinions, in addition to acts, events, and condi-

tions, as proper subjects of admissible entries." Fed.R. Evid. 803 advisory committee's note.[11]

Given this account of why the regular entries rule makes explicit reference to diagnoses and opinions, it strikes me as absurd to cite the language of that rule as support for an argument limiting the scope of "factual findings" within the meaning of the public records rule. The reason that the regular entries rule specifically mentions "diagnoses" and "opinions" has nothing whatsoever to do with why Rule 803(8) employs the term "factual findings." If anything, attributing a severely restricted significance to the phrase "factual findings" would be inconsistent with the regular entries rule: "No legislative history points to any intent on the part of Congress to limit the public records exception [Rule 803(8)] so as to exclude records which had previously qualified for admission pursuant to the business entries exception [Rule 803(6)." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803 (8)[03] (1985) (citation omitted).

In addition, "[b]road admissibility [under Rule 803 (8)(C)] releases trial judges from the duty to draw sometimes arbitrary lines between fact and opinion, and focuses the court's inquiry instead on the trustworthiness and relevance of the reports in question." *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1530 (11th Cir.1986) (Johnson, J., concurring specially); *see also* Fed.R.Evid. 704(a) ("[T]estimony in the form of an opinion or inference

11. The House Committee Notes, the Senate Committee Notes, and the Conference Committee Notes do not discuss the significance of Rule 803(6)'s use of the terms "opinions" and "diagnoses" or how the scope of those terms differs from the scope of "factual findings," as used in Rule 803(8)(C).

otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier-of-fact."). Thus, consistent with the basic approach that opinions should be admitted when helpful to the trier of fact, *see* Fed.R.Evid. 704 advisory committee's note, trustworthy and relevant evaluative opinions should be admitted under the public records exception of Rule 803(8)(C), as long as jurors can ascertain the significant facts that form the basis of the opinion. *See* 4 J. Weinstein & M. Berger, *supra*, ¶ 803(8)[03].

B.

Broad admissibility of public records containing evaluative conclusions (i.e., normative judgments drawn from the analysis of facts) is good policy because these reports are presumptively reliable. Rule 803(8)(C) is premised on "the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." Fed.R.Evid. 803 advisory committee's note (citing *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir.1952)). Admission of public records can be justified "by the probability that the officials conducting the investigation (who themselves are under a public duty) will be careful and discriminating in selecting the factual data upon which to rely in reaching their findings and conclusions." G. Lilly, *An Introduction to the Law of Evidence* 245 (1978). Most investigators under a public duty lack a motive to distort the facts or their conclusions. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir.1984); *Kehm v. Procter & Gamble Mfg.*, 724 F.2d 613, 618-19 (8th Cir.1983); *see also Melville v. American Home Assurance Co.*, 443 F.Supp.

1064, 1112 (E.D.Pa.1977), ("[P]ublic records or reports, by virtue of their being based on legal duty and authority, contain sufficient circumstantial guarantees of trustworthiness to justify their use at trial."), *rev'd on other grounds,* 584 F.2d 1306 (3d Cir.1978).

Dean McCormick offered several other reasons for allowing a trier of fact to receive an investigative report —including the investigator's conclusions based on the facts he has gathered—as evidence:

> The most important reason is time. The officer comes on the scene usually as early as it is feasible to get there. Usually the investigators of the parties come later and the statements are frequently partial and one-sided. The witnesses at the trial have often only a dim recollection of the event, and their testimony rests mostly on their pre-trial refreshment of memory by these statements. The officer is often able to interview witnesses before they have been pulled one way or the other by parties. The officer, too, is frequently a specialist—a doctor reporting death, a fire marshall investigating a fire—or at least experienced in like investigations, such as a highway patrolman reporting on a collision.

McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?* 42 Iowa L.Rev. 363 (1957). Because the source of these public reports—an investigator operating under authority of law—is presumptively reliable, "there is no reason not to admit the findings simply because they tend towards the conclusory rather than the factual end." *United States v. AT & T,* 498 F.Supp. 353, 360 (D.D.C.1980); *see also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.,* 505 F.Supp. 1125, 1144 (E.D.Pa. 1980) ("[F]actual statements need not be formally termed 'findings' in order to come in under 803(8)(C)."), *aff'd*

in relevant part, 723 F.2d 238 (3d Cir.1983), *rev'd on other grounds,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 583 (1986).

The presumption that evaluative reports of this sort are trustworthy is, of course, rebuttable. Not every public report made pursuant to an investigation authorized by law that contains factual findings will be admissible. Rule 803(8)(C) allows for the admission of evaluative reports "unless the sources of information or other circumstances indicate lack of trustworthiness." Fed.R.Evid. 803(8)(C). In other words, "if sufficient negative factors are present" to indicate that the report is not trustworthy, then it should not be admitted. *See* Fed.R.Evid. 803(8) advisory committee's note. "The factors that may be used to determine admissibility include: (1) the timeliness of the investigation; (2) the special skill or experience of the official; and (3) possible motivation problems." *Ellis v. International Playtex, Inc.,* 745 F.2d 292, 300-01 (4th Cir.1984) (citing Fed.R.Evid. 803(8)(C) advisory committee's note); *see also Perrin v. Anderson,* 784 F.2d 1040, 1047 (10th Cir.1986). The court's consideration of such negative factors provides an exclusionary mechanism sufficient to safeguard against the admission of unreliable evidence. *Melville v. American Home Assurance Co.,* 584 F.2d 1306, 1316 (3d Cir.1978).

The burden to demonstrate that an investigative report is not reliable is on the party opposing admission of the report. *Ellis,* 745 F.2d at 301 (citing *Kehm v. Procter & Gamble Mfg.,* 724 F.2d 613, 618 (8th Cir.1983); *Baker v. Elcona Homes Corp.,* 588 F.2d 551, 558 (6th Cir.1978), *cert. denied,* 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661

(1979)). As a practical matter, this makes a good deal of sense:

> Most government sponsored investigations employ well accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered. Rather than requiring the moving party to spend considerable time and money to ensure that the experts who conducted the study are available at trial, it is far more equitable to place that burden on the party seeking to demonstrate why a time tested and carefully considered presumption is not appropriate.

Ellis, 745 F.2d at 301.

C.

Rule 803(8) must be viewed in conjunction with the other rules of evidence. Accordingly, the admissibility of Rule 803(8)(C) public records of an evaluative nature, which in most cases are prepared by experts, should be interpreted broadly so that Rule 803(8)(C) is consistent with Rule 703, which provides that facts forming the basis of an expert's opinion need not themselves be admissible as long as they are "of a type reasonably relied upon by experts in the particular field." Fed.R.Evid. 703;[12] *see*

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12. Fed.R.Evid. 703 provides in full as follows:

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

also Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F.Supp. 1125, 1148 (E.D.Pa.1980), *aff'd in relevant part*, 723 F.2d 238 (3d Cir.1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Furthermore, although public records are excepted from the hearsay evidence rule because they are presumed generally to be reliable, the reliability of a particular evaluative report can be tested not only with the trustworthiness inquiry called for by Rule 803(8)(C), but also with the objections permitted by Rules 702 and 705. *See Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir. 1978). Rule 702 allows objections to the qualifications of an expert witness,[13] and Rule 705 allows disclosure on cross-examination of facts and data underlying an expert's testimony.[14] Of course, an evaluative report admissible

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13. Fed.R.Evid. 702 provides as follows:

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

14. Fed.R.Evid. 705 provides as follows:

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. In *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978) (citation and footnote omitted), the Third Circuit noted the following:

Before these objections [under Rules 702 and 705] may be recognized, however, the party challenging the validity of

(Continued on following page)

under Rule 803(8) may have to be excised in part under Rules 401 and 402, providing that irrelevant evidence is inadmissible,[15] and under rule 403, excluding relevant evidence on grounds of prejudice, confusion, or waste of time.[16]

In sum, "Rule 803(8) should be interpreted in accord with th[e] treatment of 'opinion' evidence. If the report

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(Continued from previous page)

an official report admitted under 803(8)(C) must come forward with some evidence which would impugn its trustworthiness. To allow objections to be sustained under Rules 702 and 705 without a showing of untrustworthiness would have the practical effect of nullifying the exception to the hearsay rule provided by Rule 803(8)(C).

15. Fed.R.Evid. 401 provides as follows:

Rule 401—Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed.R. Evid. 402 provides as follows:

Rule 402—Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

16. Fed.R.Evid. 403 provides as follows:

Rule 403—Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

states a conclusion that would be helpful—and is reliable—it should be admitted." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(8)[03] (1985) (footnote omitted). This determination is a matter to be left within the sound discretion of the district court. The court would thus be "free to say, pursuant to Rule 803(8)(C), 'In this particular case and in view of the shaky foundation for the conclusions, I will exclude the report unless you produce the reporting officer.'" *Id.* (quoting McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?* 42 Iowa L.Rev. 363, 369 (1957)). Another way the trial court can safeguard the rights of the party against whose interest the report is being introduced is to comment on the weight of the evidence, *id.*, and to issue an instruction cautioning the jurors against substituting the investigator's judgment for their own, *id.*; *see also In re Plywood Antitrust Litig.*, 655 F.2d 627, 637 (5th Cir. Unit A Sept.1981), *cert. dismissed*, 462 U.S. 1125, 103 S.Ct. 3100, 77 L.Ed.2d 1358 (1983); *Cohen v. General Motors Corp.*, 534 F.Supp. 509, 512 n. 3 (W.D.Mo.1982).

D.

Finally, I note that the weight of authority is against the reasoning of *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980). In 1976, the Supreme Court noted that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo*. See Fed.Rule Evid. 803(8)(C)." *Chandler v. Roudebush*, 425 U.S. 840, 863 n. 39, 96 S.Ct. 1949, 1961 n. 39, 48 L.Ed.2d 416 (1976) (citation omitted). The *Smith* court made no reference to the Supreme Court's broad reading of Rule 803(8)(C).

See Cohen v. General Motors Corp., 534 F.Supp. 509, 512 (W.D.Mo.1982) ("[I]t appears that the Supreme Court has given a broad directive for liberal use of agency findings, somewhat at variance with Judge Wisdom's cautions approach in [*Smith*].").

As Judge Johnson has noted, "*Smith* is an anomaly among the circuits. The majority view favors broad admissibility under Rule 803(8)(C)'s, 'factual findings' standard. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-301 (4th Cir.1984) ('[I]t is well established that the phrase should be interpreted broadly')." *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1530 (11th Cir. 1986) (Johnson, J., concurring specially); *see also Perrin v. Anderson*, 784 F.2d 1040, 1046-47 (10th Cir.1986); *Kehm v. Procter & Gamble Mfg.*, 724 F.2d 613, 618-19 (8th Cir. 1983); *Litton Systems, Inc. v. AT & T*, 700 F.2d 785, 819 (2d Cir.1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984); *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 554-59 (6th Cir.1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979); *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978). Even in the Fifth Circuit, *Smith* has not been uniformly followed. *See, e.g., Mac Towing, Inc. v. American Commercial Lines*, 670 F.2d 543, 547 (5th Cir.1982) (district court properly admitted Coast Guard accident report that attributed blame in shipping case); *Local Union No. 59, Int'l Bhd. of Elec. Workers v. Namco Elec., Inc.*, 653 F.2d 143, 145 (5th Cir. Unit A Aug. 1981) (findings in NLRB invesigative letter admissible under Rule 803(8)(C)); *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir.1980) ("The district judge was, indeed, in error in refusing to admit the investigative report and determination of the EEOC."),

cert. denied, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). Additionally, courts that have considered the admissibility of JAG reports, similar to the one prepared by LCDR Morgan, under Rule 803(8)(C) have broadly interpreted "factual findings." *See, e.g., Walker v. Fairchild Indus.*, 554 F.Supp. 650, 653 (D.Nev.1982); *Sage v. Rockwell Int'l Corp.*, 477 F.Supp 1205, 1207-10 (D.N.H. 1979); *Schoenborn v. Boeing Co.*, 586 F.Supp. 711, 725, 18 Av. Cas. (CCH) 18,335, 18,344-45 (E.D.Pa.1984).

IV.

A majority of this court agrees that LCDR Morgan's investigative report is a public record and that it is trustworthy for purposes of Rule 803(8)(C). The report is certainly of the sort that the rule contemplates as trustworthy: the report is thorough, as evidenced by the supporting documents totaling 159 pages, and LCDR Morgan's conclusions are credible, having been endorsed by six fellow officers of various ranks. Moreover, the district court gave the plaintiffs ample opportunity to challenge the trustworthiness of the report; nevertheless, the plaintiffs presented no evidence attacking the qualifications of LCDR Morgan or the methodology he employed.

The sole issue that evenly divides this court is whether "factual findings resulting from an investigation," Fed.R.Evid. 803(8)(C), encompass evaluative conclusions derived from the report. Based on the facts uncovered by his extensive investigation, LCDR Morgan reached several conclusions that the district court admitted into evidence. Finding that the "aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash" (Opinion No. 1), LCDR Mor-

gan eliminated, in effect, a defect in the fuel control system as the cause of the accident. He concluded that based on his investigation there was no contributing command or supervisory error (Opinion No. 2). LCDR Morgan also found that neither LCDR Rainey nor ENS Knowlton had any physical or mental ailments that could have caused the crash (Opinion No. 3). Having eliminated several other possible causes of the crash, and based on (1) the statements of the other instructors and students engaged in the "touch and go" exercise, (2) air traffic control records, and (3) an analysis of the traffic pattern diagram for Middleton Field, LCDR Morgan concluded that "[t]he most probable cause of the accident was the pilots [sic] failure to maintain proper interval." (Opinion No. 7). In other words, in LCDR Morgan's professional judgment, pilot error caused the crash.

In my view, LCDR Morgan's conclusions that were admitted into evidence at trial are "factual findings" within the common sense meaning of that term and as contemplated by the Advisory Committee and the Senate Judiciary Committee. Moreover, consistent with the overall spirit of the Federal Rules of Evidence, LCDR Morgan's evaluative findings could certainly have been helpful to the jury.

For these reasons, the district court did not abuse its discretion when it admitted portions of LCDR Morgan's "opinions." I would nevertheless reverse the district court, concurring in the en banc court's judgment that the district court improperly restricted the cross-examination testimony of John Charles Rainey.

Supreme Court, U.S.
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Nos. 87-981 and 87-1028
Consolidated

In The
Supreme Court of the United States
October Term, 1987

BEECH AIRCRAFT CORPORATION AND
BEECH AEROSPACE SERVICES, INC.,
Petitioners,

vs.

JOHN C. RAINEY,
Respondent,

BEECH AIRCRAFT CORPORATION AND
BEECH AEROSPACE SERVICES, INC.,
Petitioners,

vs.

RONDI M. KNOWLTON,
Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit**

BRIEF OF PETITIONER BEECH AIRCRAFT CORPORATION (CASE NO. 87-981)

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QUESTIONS PRESENTED

I. Whether evaluative conclusions contained in a trustworthy public report of an investigation conducted pursuant to law, are admissible pursuant to Federal Rule of Evidence 803(8)(C)?

II. Whether the Eleventh Circuit misconstrued Fed.R. Evid. 106 and 801 (d)(1)(B) in holding that the trial court abused its discretion by refusing to admit an unqualified hearsay opinion?

PARTIES TO PROCEEDINGS BELOW

1. John C. Rainey
2. Rondi M. Knowlton
3. Beech Aircraft Corporation
4. Beech Aerospace Services, Inc.
5. Pratt & Whitney Canada, Inc.[1]
6. Raytheon Company is the parent corporation of Beech Aircraft Corporation
7. Beech Aircraft Corporation is the parent corporation of Beech Aerospace Services, Inc.
8. United Technologies Corporation is the parent corportation of Pratt & Whitney Canada, Inc.
9. Underwriters at Lloyds of London and certain British companies; La Reunion Aeroienne; Aviation Office of America; and Skandia Insurance Company, Ltd., are the insurers of Beech Aircraft Corporation and Beech Aerospace Services, Inc.

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[1] The undersigned counsel are advised that Respondents Rainey and Knowlton have settled with the Petitioner Pratt and Whitney Canada, Ltd., and that a stipulation or other request has been submitted to the Court for dismissal of Case No. 87-1146.

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OPINIONS BELOW

1. The Original Panel Opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 784 F.2d 1523 (11th Cir. 1986) (Johnson, J., concurring specially) (J.A. 119).

2. The Opinion of the United States Court of Appeals for the Eleventh Circuit granting rehearing *en banc* and vacating the prior panel opinion is reported at 791 F.2d 833 (11th Cir. 1986) (J.A. 134).

3. The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit Court is reported at 827 F.2d 1498 (11th Cir. 1987) (Tjoflat, J., concurring) (J.A. 136).

4. The final judgments entered after a jury verdict in the United States District Court for the Northern District of Florida (Pensacola Division) were not reported (J.A. 101 and 103).

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STATEMENT OF JURISDICTION

This Court has certiorari jurisdiction pursuant to 28 U.S.C. 1254(1) (1982). The *en banc opinion* of the Eleventh Circuit was issued September 22, 1987. No petition for rehearing was filed. Beech Aircraft Corporation's Petition for Certiorari was filed December 15, 1987. The Petition was granted on February 29, 1988, and consolidated with Case No.'s 87-1028 and 87-1146.

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FEDERAL RULES OF EVIDENCE AT ISSUE

Federal Rule of Evidence 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as witness:

(8) Public records and reports. Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Federal Rule of Evidence 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Federal Rule of Evidence 801(d)(1)(B) Statements which are not Hearsay

Statements which Are Not Hearsay. A statement is not hearsay if—

(1) Prior Statement by Witness. The declarant testifes at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against

him of recent fabrication or improper influence or motive.

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STATEMENT OF THE CASE

These cases grow out of the crash of a trainer aircraft which claimed the lives of two naval aviators. The pilots' respective spouses, John C. Rainey and Rondi M. Knowlton brought separate suits in the United States District Court for the Northern District of Florida against Defendants, Beech Aircraft Corporation ("Beech"), Beech Aerospace Services, Inc. ("BASI") and Pratt & Whitney Canada, Ltd. ("Pratt & Whitney"). Plaintiffs sought damages pursuant to Florida's Wrongful Death Act, Fla. Stat. § 768.16-27 (1985). (J.A. 17-23, R. 13-21). Plaintiffs alleged that the T-34C Aircraft flown by LCDR Barbara Ann Rainey and Ensign Donald Bruce Knowlton was equipped with a defective pneumatic fuel control system which caused the plane to experience "power interruptions." (J.A. 17-23, R. 13-21). Following a two-week bifurcated trial, the jury returned a verdict in favor of the Defendants. (J.A. 98-100, R. 1500).[2]

The Jag Report

On July 13, 1982, flight instructor LCDR Barbara Ann Rainey and her student, Ensign Donald Bruce Knowl-

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[2] The following designations are used in this brief: "R" for the record on appeal; "J.A." for the joint appendix; the trial transcript is cited by volume followed by a colon and the page number, e.g., "V.5: 54"; Respondents will be referred to as Plaintiffs, Respondents or by their individual names where appropriate.

ton, were on a FAM training exercise at Middleton Field, Alabama. (J.A. 17-23). The accident occurred while the pilots were practicing "touch and go" landings with five other trainer aircraft.

On July 14, 1982, Lieutenant Colonel David I. Habermacher, USMC, the commanding officer of LCDR Rainey's training squadron, ordered LCDR William C. Morgan to conduct an investigation into the circumstances surrounding the air crash. This investigation was authorized by the Manual of the Judge Advocate General Chapter VI § 0902 at 9-3 to 9-5. (J.A. 3). On September 1, 1982, LCDR Morgan delivered a comprehensive investigative report to the commanding officer of the Squadron. (J.A. 3-16). Commander Morgan's investigative report consisted of a preliminary statement, findings of fact, opinions and recommendations. (J.A. 3-16). Accompanying his report were sixty (60) enclosures consisting of one hundred fifty-nine (159) pages. These enclosures included, among other things, the pilots' naval flight and medical records; the maintenance records on BUNO 160955; statements from other instructor pilots and students involved in the training exercise at the time and place of the crash; statements from on scene rescue personnel; aerial photographs of the crash scene; casualty reports on both pilots; an engineering investigation report of the subject aircraft engine; photographs of the aircraft wreckage; statements of the pilots' spouses; a diagram of the aircraft traffic pattern; a diagram of the accident site; and other relevant documents.

As part of his investigation, LCDR Morgan prepared a seven page report containing his findings. (J.A. 2-16).

This report was later endorsed by ten of Morgan's superior officers, including the Chief of Naval Operations. Some of these officers challenged various findings by Morgan, none, however, took exception with any of the evaluative conclusions contained in his report.

In its March 20, 1984 Pretrial Order, the trial court ruled that LCDR Morgan's report was a trustworthy public record. (J.A. 35). The Court at that time, however, limited the admissibility of the report to the factual findings contained therein. (J.A. 35).

In the ensuing months before trial, the Defendants continued to urge that, as a trustworthy public record, Commander Morgan's Jag report should be admitted in its entirety. At a June 6, 1984 hearing on pending motions the Defendants again argued in favor of broad admissibility of Commander Morgan's findings. Shortly thereafter, with leave, both Beech and BASI submitted separate letters and legal memoranda urging the trial court to admit the entire Jag report. (R.1293-1304, 1328-1331, 1440).

At a conference on July 10, 1984, the trial court announced that, after reviewing the authorities and having further discussion with counsel, it would allow as evidence certain evaluative findings contained in the Jag report. (J.A. 40). The court thereupon excised certain portions of Morgan's findings and indicated to counsel that the following evaluative conclusions from the Jag report would be received. (J.A. 40-42):

> 1. Examination of the findings of fact, aircraft history and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, sociologically, or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure to ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

5. Because both pilots were killed in the crash and because of the nearly total destruction of the aircraft by fire, it is almost impossible to determine exactly what happened to Navy 3E955 from the time it left the runway on its last touch and go until it impacted the ground.

7. The most probable cause of the accident was the pilots failure to maintain proper interval.

(J.A. 97). At the time of this ruling the Court granted Plaintiff's request to present evidence on the trustworthiness of the report. (J.A. 42). Defendants agreed, and offered no objection to the calling of previously unlisted witnesses for this purpose. (J.A. 42). Notwithstanding this invitation the Plaintiffs did not call any witnesses, nor did they present any evidence on the trustworthiness of the Jag report.

Cross-Examination of LCDR Rainey[3]

Plaintiff, John C. Rainey, was called by the defense as an adverse party witness. (J.A. 53; V.5: 60). During direct examination Rainey was questioned about certain

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[3] Both the plaintiff John C. Rainey, and Barbara Ann Rainey were Lieutenant Commanders in the United States Navy.

admissions contained in an unsolicited post-accident letter which he had written to the investigating Jag officer, LCDR Morgan. These written admissions concerned statements Rainey had made regarding unnecessary pressures on the pilots to complete the flight and the final maneuvers of the downed aircraft. During direct by the defense, Rainey was not asked his opinion as to the proximate cause of this air crash. (J.A. 53-75; V.5: 60-82).

On cross by his counsel, Rainey testified that he had not attempted to influence the testimony of any witnesses. (J.A. 76). He also testified that he had flown the final flight path maneuvers of his wife's aircraft and that it was his experience that the plane would not stall with full power available. (J.A. 76-77). The trial court, however, sustained an objection and refused to allow Plaintiff's counsel to ask Rainey whether his letter contained his opinion "that the most probable primary cause of this mishap was rollback". (J.A. 77). The trial court ruled that Rainey had not been properly qualified to give such an opinion. (J.A. 77-78; V.5: 85-86).

On July 20, 1984 the jury returned a verdict in favor of all Defendants. (J.A. 98-100; R. 1500). On August 1, 1984 the Plaintiffs filed a new trial motion contending that the Court erred in admitting the Jag officer's evaluative conclusions, and in restricting the cross-examination of LCDR John Rainey. (R.1508-1510). The motion was denied. (R.1548).

On appeal, a panel of the Eleventh Circuit reversed as to each of these evidentiary rulings. The panel concluded that it was bound by prior Fifth Circuit precedent, construing Fed.R.Evid. 803(8)(C), which excluded evalu-

ative conclusions contained in public investigative reports, citing *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980).[4] On this authority the panel held that it was error to admit the edited evaluative conclusions contained in Morgan's trustworthy report. *See Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523 (11th Cir. 1986). Judge Johnson concurred in the panel opinion but urged the full Court to accept jurisdiction, *en banc*, to reconsider this interpretation of Rule 803(8)(C). In his concurrence, he characterized *Smith v. Ithaca* as "an anomaly among the circuits", and urged the entire court to adopt the majority rule favoring broad admissibility of evaluative conclusions. *Rainey*, 784 F.2d at 1530.

The panel also reversed because it felt that the Trial Court improperly limited the cross-examination of Commander Rainey. The Panel held that the Rule of Completeness, as codified in Fed.R.Evid. 106, required that Rainey be afforded an opportunity to testify and offer his opinion on causation which was contained in his unsolicited post accident letter to Morgan. The panel also indicated, in a footnote, that Rainey's opinion on causation should have been admitted as a prior consistent statement pursuant to Fed.R.Evid. 801(d)(1)(B). *See* 784 F.2d at 1529.

Each defendant filed a Petition for panel re-hearing and re-hearing *en banc*. On May 27, 1986, the *en banc*

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[4] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions issued prior to September 30, 1981. Such precedent under *Bonner* can only be overruled en banc by a majority of the Eleventh Circuit. *Id.* at 1210-1212.

Court vacated the panel opinion and ordered briefing and rehearing *en banc*. *Rainey v. Beech Aircraft Corp.*, 791 F.2d 833 (11th Cir. 1986). On September 22, 1987 the Court issued its *en banc per curiam* opinion holding that Morgan's investigative report was a trustworthy public record of an investigation conducted pursuant to law. (J.A. 177). The *en banc* Court, however, was divided six-six on the issue of whether evaluative conclusions contained in trustworthy reports are admissible pursuant to Fed.R.Evid. 803(8)(C). *See Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498 (11th Cir. 1987). Because of this division, the Court was constrained to follow the decision of the panel opinion, which excluded the evaluative conclusions. On the second point the *en banc* court agreed with the panel that the trial court had improperly limited the cross-examination of Rainey.

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SUMMARY OF ARGUMENT

The Petitioner, Beech, respectfully argues that the district court properly applied Fed.R.Evid. 803(8)(C) in admitting into evidence trustworthy evaluative conclusions contained in a Jag report prepared pursuant to law. The report was prepared by a duly appointed Naval officer after conducting an extensive investigation into the crash of a Navy Trainer Aircraft.

After deliberation over four months the trial court correctly determined that the phrase "factual findings" as used in the Rule is broad enough to include trustworthy evaluative conclusions drawn by the investigative officer.

This result is supported by the advisory committee note and Senate Report on the Rule, both of which urge the admission of evaluative findings which are contained in trustworthy public records. The position favoring broad admissibility of evaluative findings is the better reasoned approach, and is one which has been approved by every Circuit to consider the issue save the Eleventh.

Once it is determined that a report is a public record of an investigation conducted pursuant to law the court's central inquiry should be the trustworthiness of the findings. Although the Rule provides for admissibility in the first instance, there are additional safeguards to assure the reliability of a report before it is received as evidence. If, after discovery and analysis by the District Court a report is found trustworthy, and it contains findings which are helpful and relevant, they should be submitted for consideration and weighing by the finder of fact.

The Eleventh Circuit also misapplied a fundamental principle of evidence in holding that the trial court abused its discretion by refusing to allow a lay witness to express a hearsay expert opinion on the issue of causation. Plaintiff, John C. Rainey, was called by the defense as an adverse witness and questioned about certain factual admissions contained in an unsolicited post-accident letter which he had written to Jag Officer Morgan. On cross-examination, by his own counsel, Rainey was asked whether his letter also contained his opinion on causation. The trial court sustained an objection to this question, ruling that Rainey had not been properly qualified to render such an opinion.

On appeal, for the first time, a panel of the Eleventh Circuit opined that Rainey should have been allowed to

offer his opinion on causation pursuant to the Rule of Completeness, Fed.R.Evid. 106. This conclusion, we respectfully say, was wrong since Plaintiffs never raised this Rule of Evidence at pretrial, trial or on appeal to support admissibility of Rainey's opinion. The history, language, and purpose of Rule 106 indicate that it is not self-executing. To avoid a waiver a party must invoke the Rule as soon as he believes that a written document is being introduced in a misleading fashion.

In the instant case, Rule 106 appears nowhere in the record as it was never raised by the Plaintiffs. To overturn a two-week trial on a point of evidence which was never presented for the trial court's consideration is fundamentally wrong. Rule 106 is also inapplicable because Rainey's purported expert opinion was inadmissible hearsay. The rule is designed to cover an order of proof problem, it should not be used as a guise to admit otherwise inadmissible testimony.

The Eleventh Circuit also concluded in a footnote that Rainey's statement was admissible as a prior consistent statement. This rule, namely, Fed.R.Evid. 801(d)(1)(B) was misapplied since Rainey had not been impeached or charged with a recent fabrication. In fact, his testimony on direct was entirely consistent with his previous statements. Thus, no predicate existed to support admission of Rainey's hearsay opinion on causation as a prior consistent statement. By this holding the Eleventh Circuit has improperly approved the use of prior consistent statements to bolster a party's general theory of the case.

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ARGUMENT

I

THE TRIAL COURT PROPERLY APPLIED FEDERAL RULE OF EVIDENCE 803(8)(C), IN ADMITTING EVALUATIVE CONCLUSIONS CONTAINED IN A TRUSTWORTHY INVESTIGATIVE REPORT PREPARED PURSUANT TO LAW.

The issue presented for this Court's consideration is whether the phrase "factual findings" as used in Rule 803(8)(C) contemplates the admission of evaluative conclusions derived from reports prepared pursuant to law.

This Rule of Evidence codifies the common law by providing a hearsay exception for trustworthy public reports. *See* Fed.R.Evid. 803(8)(C) advisory committee note. The Rule, when approved, expanded then existing law which had required resort to the less appropriate business records exception where non-federal public agencies were involved.

For a report to be admitted pursuant to Rule 803(8)(C) the court must be satisfied that it is a trustworthy public record of an investigation conducted pursuant to law. In the present case, these preliminary considerations have been resolved by the District Court, the panel, and the *en banc* Court of Appeals all of whom agreed that Morgan's report was a trustworthy public record. *See Rainey v. Beech Aircraft Corporation*, 827 F.2d 1498, 1516 (11th Cir. 1987), Tjoflat J. concurring ("A majority of this court agrees that LCDR Morgan's investigative report is a public record and that it is trustworthy for purposes of Rule 803(8)(C)").[5]

A. Intent of the Drafters

The scope of the phrase "factual findings" as used in Rule 803 has been the source of some debate. Prior to the adoption of the Federal Rules of Evidence the cases were divided on whether evaluative conclusions contained in public reports were admissible. *See* Fed.R.Evid. 803(8)(C) advisory committee note. The drafters of the Rules intended to resolve this split by providing for the admission of evaluative conclusions contained in trustworthy public reports. *Zenith Radio Corp. v. Matsuchita Electric Industrial Company*, 505 F. Supp. 1125, 1145 (E.D. Pa. 1980), *aff'd in relevant part rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) ("The advisory committee notes accompanying 803(8)(C) makes clear the intent of the drafters to permit admission of the evaluative report"). In reaching its conclusion in favor of broad admissibility the advisory committee looked for guidance to several federal statutes which create hearsay exceptions for evaluative conclusions contained in public reports. Noting that these statutes authorized the admission of evaluative findings the advisory committee opined:

> While these statutory exceptions to the hearsay rule are left undisturbed, Rule 802, the willingness of Congress to recognize a substantial measure of admissibility for evaluative reports is a helpful guide.

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[5] See *Rainey v. Beech Aircraft*, 827 F.2d 1498 (11th Cir. 1987) ("The sole issue that evenly divides this Court is whether 'factual findings' resulting from an investigation; Fed.R.Evid. 803(8)(C), encompasses evaluative conclusions derived from the report") *Id.* at 1516.

See Fed.R.Evid. 803(8)(C) advisory committee note. As this excerpt demonstrates, the intention of the drafters was to give a broad construction to the phrase "factual findings," and to permit introduction into evidence of evaluative conclusion. *See Ellis v. International Ulaytex Inc.*, 745 F.2d 292, 301 (4th Cir. 1984) (" . . . . it is well established that the phrase should be interpreted broadly). *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557 (6th Cir. 1978) *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979) ("The advisory committee notes, however, accept evaluative reports as being within the meaning of factual findings under Rule 803(8)(C)"). *See also Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir. 1978). Thus, evaluative conclusions are admissible pursuant to Rule 803(8)(C) as long as the investigative public report contains sufficient indicia of trustworthiness. *See Zenith Radio Corp. v. Matsushita Electric Industrial Company*, 505 F. Supp. 1125, 1145.

Despite the clear intent of the drafters, the House and Senate Judiciary Committees differed as to the proper scope of the Rule. The House Committee felt that the phrase "factual findings" should be strictly construed to exclude evaluative conclusions. *Report of the Committee on the Judiciary* H.R. Rep. No. 93-650, 93rd Congress, 1st Sess. 14 (1973). The Senate Committee took strong exception to this limited understanding of the application of the rule, finding that such an interpretation was contrary to the "intended operation of the rule as explained in the Advisory Committee notes." *Report of the Committee on the Judiciary* S. Rep. No. 93-1277 93rd Congress, 2d Sess. 18 (1974). This conflict was never resolved, as the Conference Committee made no reference to the scope

of Rule 803(8) or to the meaning of the phrase "factual findings." *See Notes of Conference Committee* H.R. Conf. Rep. No. 1597, 93d Cong. 2d Sess. *See also Baker v. Elcona Homes*, 588 F.2d 551, 556-557 (6th Cir. 1978). Although the legislative history concerning the admission of evaluative conclusions in public reports is equivocal, "the Senate's view is more consistent with the other hearsay exceptions and with the general spirit of the Federal Rules of Evidence, and is more easily justified on policy grounds." *Rainey*, 827 F.2d at 1511 (Tjoflat, J. concurring.) *See also United States v. American Telephone & Telegraph*, 498 F. Supp. 353, 359 (D. D.C. 1980) ("Extrinsic materials indicate that the Rule is most appropriately considered by following the Senate Committee's position"). The Senate and Advisory Committee's broad interpretation of Rule 803(8)(C) has been adopted by the overwhelming number of courts. In fact, every Circuit Court of Appeals which has addressed this issue, except the Eleventh Circuit, has sanctioned the admissibility of evaluative conclusions which are contained in trustworthy reports of investigations conducted pursuant to law. *See, e.g.*, Second Circuit; *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785, 818 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984); Third Circuit: *Melville*, 584 F.2d at 1316. Fourth Circuit: *Ellis*, 745 F.2d at 300, 301; Fifth Circuit: *McClure v. Mexia Independent School District*, 750 F.2d 396, 399-400 (5th Cir. 1985);[6] Sixth Cir-

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[6] The Fifth Circuit adopted a narrow construction of Rule 803(8)(C) in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980). Counsel notes, however, that the Fifth Circuit has

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cuit: *Baker,* 588 F.2d at 557-58; Seventh Circuit: *Baz v. Walters,* 782 F.2d 701, 705 n.2 (7th Cir. 1986); Eighth Circuit: *Kehm v. Proctor & Gamble Manufacturing Co.,* 724 F.2d 613, 618 (8th Cir. 1983); Ninth Circuit: *Plummer v. Western International Hotels Co.,* 656 F.2d 502, 504-505 (9th Cir 1981); Tenth Circuit: *Perrin v. Anderson,* 784 F.2d 1040, 1046-47 (10th Cir. 1986). *See also Chandler v. Roudebush,* 425 U.S. 840, 863, n.39, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976).[7] The composite result reached, over time, by these courts represents the better reasoned view and is consistent with the intent of the drafters as well as the overall spirit and purpose of the Federal Rules of Evidence. *Rainey,* 827 F.2d at 1511.

B. Considerations of Public Policy

The supporting rationale for Fed.R.Evid. 803(8)(C), as with all hearsay exceptions is that, where sufficient

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(Continued from previous page)

been less than uniform in its application of this rule. *See Mac Towing Inc. v. American Commercial Lines,* 670 F.2d 543, 547 (5th Cir. 1982); *Local Union No. 59, International Brotherhood of Electrical Workers v. Namco Electric, Inc.,* 653 F.2d 143, 145 (5th Cir. 1981); *Garcia v. Gloor,* 618 F.2d 264, 272 (5th Cir. 1980) *cert. denied,* 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). *See also Rainey,* 827 F.2d 1515, 1516 (Tjoflat, J., concurring). To say the very least, *Ithaca* has a checkered past.

7 In *Chandler,* this Court held that prior administrative findings in an employment discrimination case are admissible, pursuant to Rule 803(8)(C), in a subsequent federal trial on the same claim. The reasoning in *Chandler* was adopted in *Cohen v. General Motors,* 534 F. Supp. 509 (W.D. Mo. 1982), wherein the Court admitted conclusory findings by the National Highway Traffic Safety Administration (NHTSA). In so doing, the District Court rejected the reasoning in *Smith v. Ithaca Corp.,* 612 F.2d 215 (5th Cir. 1980), noting that this Court, in *Chandler,* had "given a broad directive for liberal use of agency findings." *Cohen,* 534 F. Supp. at 512. *See also Baker v. Elcona Homes Corp.,* 588 F.2d 551, 557 (6th Cir. 1978).

guarantees of trustworthiness exist a relevant statement should be admitted for consideration by the trier of fact. *See* Fed.R.Evid. 803(8)(C) advisory committee note. Admissibility of public reports in the first instance is initially supported by the fact that government investigators generally employ well understood methodology, and traditionally conduct their investigations at or near the time of the incident in question. *Rainey,* 827 F.2d at 1512, 1513 (Tjoflat, J. concurring). Thus, the fundamental trustworthiness of a public report arises from the rebuttable presumption that officials will perform their duties properly with no motive other than to inform the public fairly and adequately.[8] *Ellis,* 745 F.2d at 300, and *Kehm,* 724 F.2d at 618. The Rule also performs a practical function as it is unlikely that government investigators will always be available to testify or that they will recall the specifics of an investigation independently of the record. *See* Fed.R.Evid. 803(8)(C) advisory committee note *citing Wong Wing Foo v. McGrath,* 196 F.2d 120 (9th Cir. 1952). *See also* McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations,* 42 Iowa L.Rev. 363 (1957).

The rationale of Rule 803(8)(C) applies whether a report's findings are characterized as historical facts or

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8 The presumption regarding the impartiality and fairness of government investigators is particularly applicable where, as here, the report contains findings unfavorable to officers of the agency conducting the investigation. *Cf. Perrin,* 784 F.2d at 1047 (rejecting argument that an internal investigation resulting in a *favorable* report to an officer of the investigating agency is necessarily biased, absent specific evidence.) Of course, any such motivational problems are matters to be brought to the court's attention during the initial trustworthiness determination. *See* Fed.R.Evid. 803(8)(C), advisory committee note.

evaluative conclusions. The presumption of reliability is simply not dependent on the description or characterization of the findings.

> The rationale for the admissibility of factual findings contained in public records . . . lies in their fundamental trustworthiness. The guarantee of trustworthiness does not necessarily reside in the contents of the records, be they facts or conclusions but rather in their source. "[P]ublic records or reports, by virtue of their being based on legal duty and authority, contain sufficient circumstantial guarantees of trustworthiness to justify their use at trial." Since the reliability of the factual findings results essentially from the fact that the public official concerned is pursuing an investigation authorized by law, there is no reason not to admit findings simply because they tend towards the conclusory rather than the factual end, unless as Rule 803(8)(C) further provides, the "sources of information or other circumstances indicate lack of trustworthiness." [citations and footnotes omitted]

United States v. American Telephone & Telegraph, 498 F. Supp. at 360. As is indicated, the trustworthiness and reliability of an investigative report dictates its admissibility, rather than an artificial distinction between those findings which are conclusionary and those which are factual.

A strong policy basis supports the view that evaluative conclusions contained in public reports should be considered factual findings within the meaning of the Rule. In an era where agency investigations occur with increasing regularity, the Rule provides a needed link between administrative agencies and the judiciary.

> Each year at great cost to the public, administrative agencies conduct numerous investigations that produce evaluative reports, most of which are reliable. These reports doubtless contain information and conclusions of considerable probative value in private litigation. The drafters of rule 803(8)(C) created a hearsay exception to take advantage of this public resource.

The Trustworthiness of Government Evaluative Reports Under Federal Rule of Evidence 803(8)(C), 96 Harvard Law Review 492 (1982). This note posits the question whether restrictive interpretations of Rule 803(8)(C) may severely undermine the important interrelationship between the judicial and administrative branches. If trustworthy administrative findings are to be shielded from the fact finder simply because they contain evaluative conclusions, the end result will be a significant impediment in the ultimate search for truth.

Admission of trustworthy evaluative conclusions pursuant to Rule 803(8)(C) also releases trial courts from the difficult, and often arbitrary decision, of distinguishing between those findings which are evaluative and those findings which are factual. *See Miller v. New York Produce Exchange*, 550 F.2d 762, 769 (2d Cir. 1977) *cert. denied*, 434 U.S. 823, 98 S.Ct. 68, 54 L.Ed.2d 80 (1977); *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523 (11th Cir. 1986) (Johnson, J., concurring). ("Broad admissibility releases trial judges from the duty to draw sometimes arbitrary lines between fact and opinion, and focuses the Court's inquiry instead on the trustworthiness and relevance of the reports in question"). Relieving trial courts of the burden of drawing hair-splitting fact/opinion distinctions would also prevent the creation of a new series of

endless appeals by litigants seeking to challenge the trial court's determination. *See* 4 J. Weinstein and M. Berger *Weinstein's Evidence* 803(8) [03] (" . . . a clear cut distinction between fact and opinion is impossible to draw").

Admissibility of public reports is also supported by the fact that governmental investigations are often difficult, if not impossible, to replicate. Often, a litigant will have access to neither the resources nor expertise necessary to duplicate a government investigation. *See, e.g., Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir. 1983) (Epidemiological studios by center for disease control on statistical incidence of toxic shock syndrome). Lastly, Government investigators often enter the picture at or near the time of a particular event and have access to eyewitnesses' accounts and other information which may not be available at a later date. *See Sage v. Rockwell International Corporation*, 477 F. Supp. 1205, 1210 (D. N.H. 1979). To exclude these reports simply because they contain evaluative conclusions may deprive the fact finder from access to evidence which is not otherwise available.

C. Trustworthiness and Safeguards

Although weighted in favor of admissibility, Rule 803(8)(C) does not authorize the unregulated admission of all governmental investigative reports. Prior to admission, the Court must be satisfied that the report is relevant and that its findings are *trustworthy*. *See Kehm*, 724 F.2d 613, 618 (" . . . . once a report is conclusively shown to represent findings of a public agency made pursuant to an investigation authorized by law, the central inquiry becomes whether the report is trustworthy"). Thus, although the rule provides for admissibility in the first instance it also

contains "ample provision for escape if sufficient negative factors are present." Fed.R.Evid. 803(8)(C) advisory note.

That trustworthiness is critical to the Court's analysis is indicated by the text of the rule itself, which sanctions the admission of government reports, "unless the sources of information or other circumstances indicate lack of trustworthiness." *See* Fed.R.Evid. 803(8)(C). Reliability is also the central focus of the advisory committee note which suggests several factors for determining trustworthiness:

> (1) the timeliness of the investigation;
>
> (2) the special skill or experience of the official;
>
> (3) whether a hearing was held and the level at which it was conducted; and
>
> (4) possible motivational problems involved with the preparation of the report. (citations omitted)

Fed.R.Evid. 803(8)(C) advisory committee note. This listing is, of course, only illustrative and non-exclusive, leaving the courts free to consider other factors which may bear on the trustworthiness of a particular report. *See Zenith Radio Corp.*, 505 F. Supp. 1125, 1147 (listing seven additional factors which the court considered in determining the trustworthiness of a public report).[9]

Through discovery, counsel can scrutinize the means and methodology employed in an investigation as well as

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[9] The advisory committee note to 803(8)(C) in providing a non-exclusive list of factors affecting trustworthiness specifically advises that, "others no doubt could be added." Fed.R.Evid. 803(8)(C) advisory committee note.

the qualifications of the investigator. After reviewing the evidence, the trial court can determine which, if any, portions of a public report are admissible. *See Perrin,* 784 F.2d at 1047; *Miller,* 550 F.2d at 769. *See also Franklin v. Skelly Oil Co.,* 141 F.2d 568, 572 (10th Cir. 1944) ("the trial court is the first and best judge of whether tendered evidence meets that standard of trustworthiness and reliability which will entitle it to stand as evidence of an issuable fact, absent the test of cross-examination"). The exclusionary provision of Rule 803(8)(C) itself, therefore, provides a sufficient safeguard against the admission of unreliable evidence. *Melville,* 584 F.2d at 1316.

Other Federal Rules of Evidence provide additional check points through which the trustworthiness issue must pass. Initially, any finding can be tested by the relevancy requirements of Fed.R.Evid. 401 and 402. If found relevant, evidence may nevertheless be excluded on the grounds of prejudice, confusion or waste of time. See Fed.R.Evid. 403. Additionally, since public evaluative reports are now generally prepared by experts, Rule 803(8)(C) can be interpreted in conjunction with Rule 702, which permits objections to the qualifications of an expert, and Rule 705, which allows disclosure on cross-examination of facts underlying an expert's testimony. *See Melville,* 584 F.2d at 1316.[10]

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10 Invocation of Rules 702 and 705, however, would not be warranted until a sufficient showing of untrustworthiness has been established. *See Melville,* 584 F.2d at 1316 ("Before these objections may be recognized, however, the party challenging the validity of an official report admitted under 803(8)(C) must come forward with some evidence which would impugn its trustworthiness.")

Beyond the safeguards provided in the rules, a party against whom a report is offered may always attack the weight and credibility of the findings before the jury. As one court has noted, "[a]lthough Rule 803(8) requires the court to make a threshold determination on the trustworthiness, the Rule also clearly implies that where the court determines that the evidence passes that threshold, the party against whom the evidence is offered may counter it by introducing before the jury evidence of the trustworthiness of the public record or report." *Zenith Radio Corp.,* 505 F. Supp. at 1146. *See United States v. School District of Ferndale,* 577 F.2d 1339, 1355 (6th Cir. 1978) (circumstances that do not clearly indicate lack of trustworthiness may affect weight given the findings). This procedure permits admission without sacrificing scrutiny. *Ellis,* 745 F.2d at 303.

Finally, the authority of the trial court to give a cautionary instruction provides an umbrella safeguard against any potential prejudice which may arise from the admission of a public report. *See Zenith Radio Corp.,* 505 F. Supp. at 1146 n.15. Such an instruction may focus on the weight to be given the report's findings or a warning to the jury regarding substituting an official's judgment for their own. *See* 4 J. Weinstein and M. Berger, *Weinstein's Evidence* § 803(8) [03] (1985).

In the present case, the Respondents made no attempt to attack the reliability of the Jag report or the qualifications of LCDR Morgan. *See Rainey,* 827 F.2d at 1508. ("Although the plaintiffs knew months before trial that the defendants would seek to admit LCDR Morgan's investigative report into evidence, they attacked neither the qualifi-

cations of LCDR Morgan nor the methodology he employed''). At the July 10, 1984 pretrial conference the Court granted plaintiff's request to submit evidence regarding the trustworthiness of the Jag report.[11] The trial court also indicated that it would consider any cautionary instructions submitted by the Plaintiffs. (J.A. 42). Despite this invitation the Respondents-Plaintiffs failed to submit any evidence to impugn the trustworthiness of the report or the qualifications of LCDR Morgan. As a result the trial and appellate courts correctly concluded that the Jag report was trustworthy for purposes of Rule 803 (8)(C). *Rainey*, 827 F.2d at 1508 ("The Plaintiffs have not met their burden. For these reasons this court cannot, and does not, set aside the district court's finding that the report is trustworthy").[12]

D. Consideration by the Finder of Fact

With trustworthiness firmly established, Respondents are forced to argue that the evaluative conclusions in trustworthy public reports are *per se* inadmissible. Although this position is at variance with the stated purpose of Rule 803(8)(C), Respondents urge that the Jag report went to an ultimate issue and, thus, invaded the province of the jury. This contention, however, is nothing more than

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11 The defendants stipulated that they would have no objection to plaintiff's calling unlisted witnesses for this purpose. (J.A. 41-42).

12 Plaintiffs did present expert opinion evidence at trial which was clearly at odds with the findings in the Jag report. Thus, the jury was fully aware of the parties' conflicting assessments of the validity of the findings in the Jag report and was fully capable of evaluating the evidence on both sides. *See Kehm*, 724 F.2d at 619.

a veiled attempt to resurrect the long dead "ultimate issue" rule. This common law rule was expressly abolished by Federal Rule of Evidence 704, which provides:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionale because it embraces an ultimate issue to be decided by the trier of fact.

Fed.R.Evid. 704[13] The basis typically asserted in favor of the common law rule, namely to prevent the witness from "usurping the province of the jury is aptly characterized as 'empty rhetoric'." Fed.R.Evid. 704 advisory committee note, 7 Wigmore on *Evidence* § 1920 (1940), *United States v. Morgan*, 554 F.2d 31, 33 (2d Cir. 1977), *cert. denied*, 434 U.S. 965, 98 S.Ct. 504, 54 L.Ed.2d 450 (1977). Of course, not every opinion which embraces an ultimate issue is automatically admissible. As with all opinions, one going to an ultimate issue should only be allowed when the court determines that its admission would be helpful to the trier of fact. *See* Fed.R.Evid. 702, *Rainey*, 827 F.2d at 1512.

In this case admission of the Jag officer's findings could only serve to aid the jury in its duties. The tragic death of both pilots, together with the almost total destruction of their aircraft made expert testimony critical. In fact, at trial each party relied heavily on expert testimony in an effort to prove their respective cases. *See Rainey*, 827 F.2d at 1507. Many of these experts gave direct testi-

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13 The ultimate issue Rule was abolished by the Federal Rules of Evidence because the advisory committee concluded that it was premised on an unworkable fact/law distinction. *See* 4 J. Weinstein & M. Berger *Weinstein's Evidence*, § 803 (8) [03] (1985).

mony on the issue of ultimate liability. Given this fact, there is no justification for excluding the findings of LCDR Morgan, the only impartial expert, and the only individuals to investigate this crash immediately following its occurrence.[14]

If the goal of the Federal Rules of Evidence is to insure, "that the truth may be ascertained and proceedings justly determined," then there is no logical reason for excluding evaluative conclusions which are trustworthy. *See* Fed.R.Evid. 102. Often these evaluative conclusions are highly probative and provide the only unbiased expert findings on a particular issue. Thus, if these findings are trustworthy they should be submitted for consideration and weighing by the finder of fact.

> Rule 803(8) should be interpreted in accord with th[e] treatment of 'opinion' evidence. If the report states a conclusion that would be helpful—and is reliable—it should be admitted.

Rainey, 827 F.2d at 1515. (Tjoflat, J., concurring) (quoting from 4 J. Weinstein and M. Berger *Weinstein's Evidence*, 803(8) [03] (1985). To arbitrarily exclude trustworthy relevant findings simply because they tend towards the conclusory is an unwarranted restriction on the trier of fact. On balance, juries in this country have long been considered capable of making fine distinctions and according appropriate weight to particular pieces of evidence. This Court, on occasion, has taught that the jury's function will not be impaired by consideration of a government re-

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[14] The Mishap Board officers could not give evidence nor could their Report be obtained or used.

port. In *Meeker v. Lehigh Valley Railroad Company*, 236 U.S. 412, 35 S.Ct. 328, 59 L.Ed 644 (1915), the Court upheld the admission of findings and orders of the Interstate Commerce Commission. In rejecting the contention that admission of the report infringed upon the right to a trial by jury, this Court stated:

> This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents.

Id. at 430, 35 S.Ct. at 335. *See also In the Matter of Peterson*, 253 U.S. 300, 310, 40 S.Ct. 543, 64 L.Ed. 919 (1920).[15] Likewise, here any party was free to introduce evidence and to call any witnesses, including Jag Officer Morgan, to attack or support the report and its findings. *See Mac Towing, Inc. v. American Commercial Lines*, 670 F.2d 543, 547 (5th Cir. 1982) (court properly admitted report of Marine accident but was free to give document whatever weight it deserved). In the instant case the system worked as intended. Respondents are simply dissatisfied because they inexplicably failed to present any evidence attacking either the qualifications of Jag Officer Morgan, the methodology which he employed, or the results of his investigation.

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[15] This conclusion is all the more appropriate in the instant case, because the findings in the Jag report created no presumption, but were instead to be considered together with all the other evidence presented.

E. Plain Language of the Rule

The use of the phrase "factual finding" in Rule 803(8)(C) further militates against a restrictive interpretation. A *finding* is defined by Black's as, "[a] decision upon a question of fact reached as a result of a judicial examination or investigation by a court, jury, referee, coroner, etc."[16] Black's defines a *finding of fact* as "[A] conclusion by way of reasonable inference from the evidence." Black's Law Dictionary 569 (5th ed. 1979) *See also Griffith v. Gardner,* 196 F.2d 698, 701 (9th Cir. 1952). Thus, the phrase *factual findings* by its plain meaning is broad enough to include investigative conclusions derived from an examination of the facts without exercise of legal judgment. *See Rainey,* 827 F.2d at 1510, and *Zenith Radio Corp.,* 505 F. Supp. 1144 (". . . . the term is broad enough to encompass any statement of fact that represents a conclusion on the part of an investigator . . ."). Therefore, by its commonly understood meaning, factual finding includes investigative conclusions derived from an examination of the facts. *Rainey,* 827 F.2d at 1510 (Tjoflat, J. concurring).

This interpretation of the phrase factual findings comports with vase majority of cases, which have admitted evaluative conclusions derived from investigative facts. By way of example, courts have determined that the following investigative conclusions qualify as "factual findings" pursuant to Rule 803(8)(C): conclusion of Coast

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16 Ballentine's Law Dictionary defines finding of fact as, "[A] conclusion drawn . . . . from the facts without exercise of legal judgment." Ballantine's Law Dictionary 474 (3d ed. 1979).

Guard hearing examiner regarding responsibility for an assault. *See Lloyd v. American Export Lines, Inc.,* 580 F.2d 1179 (3d Cir. 1978), *cert. denied,* 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978); administrative law judge's finding that Captain acted reasonably in mooring vessel. *See Complaint of Paducah Towing Co.,* 692 F.2d 412, 421 (6th Cir. 1982); conclusion in internal police report that officer acted contrary to department policy in handcuffing suspect with his weapon cocked; *Wilson v. Beebe,* 770 F.2d 578, 590 (6th Cir. 1985); HEW finding that school had been established and maintained for segregatory purposes, *United States v. School District of Ferndale,* 577 F.2d 1339, 1354 (6th Cir. 1978); police officer's conclusion that particular vehicle ran a red light, *See Baker v. Elcona Homes Corp.,* 588 F.2d 551, 556 (6th Cir. 1978), *cert. denied,* 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979); determination that phone company's rates were unreasonable and discriminatory. *See Litton Systems, Inc. v. ATdT,* 700 F.2d 785, 818-819 (2d Cir. 1983), *cert. denied,* 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984).

Consistent with these decisions, the trial court herein admitted Morgan's finding that "the most probable cause of the accident was the pilot's failure to maintain proper interval." This evaluative conclusion had been derived from a specific factual finding which had also been incorporated in Morgan's report (Finding of fact #13, "At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned") (J.A. 10). Thus, Morgan's finding was simply an evaluative conclusion, which he had derived after conducting an extensive factual inquiry. This report, however, did not reach a legal conclusion, make a finding of negligence

or attempt to attribute ultimate fault. We respectfully suggest that Morgan's evaluative conclusion is the type of trustworthy finding contemplated by Rule 803(8)(C), and was properly admitted.

II

FEDERAL RULE OF EVIDENCE 106 WAS NEVER INVOKED BY THE PLAINTIFFS AND IS WHOLLY INAPPLICABLE TO THE TESTIMONY OF LCDR RAINEY.

Plaintiff, LCDR John C. Rainey, was called by the defense as an adverse party witness.[17] During direct, Rainey was questioned about statements contained in an unsolicited letter which he had written. The letter was written after he had conducted his own informal investigation into the circumstances surrounding the accident. Rainey sent this letter to LCDR William C. Morgan, the Jag officer appointed to investigate this air crash.

On direct Rainey was questioned about factual admissions contained in his letter. (J.A. 53-75). These questions were limited to objective facts involving unnecessary pressure on the pilots, and the final flight maneuvers of the downed aircraft. (J.A. 53-75). As one would expect LCDR Rainey was never asked his opinion as to the legal cause of this tragic accident.

The Rainey letter was not admitted as evidence, in whole or in part, nor did counsel attempt to read its contents to the jury. (J.A. 53-78).

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17 Rainey was not called as a witness by the Plaintiffs, either in their case in chief or in rebuttal.

On cross examination by his counsel, LCDR Rainey explained that he had not attempted to influence the testimony of any witnesses. (J.A. 76). He also testified that shortly after this accident, he and Commander Shields had duplicated the final flight maneuvers of his wife's aircraft, and in their experience the plane would not stall with full power available. (J.A. 76-77). The trial court refused, however, to allow Plaintiff's counsel to ask Rainey whether his letter also contained his opinion that, "the most probable primary cause of this mishap was rollback." (J.A. 77). The basis for the trial court's ruling was that Rainey had not been qualified to render an expert opinion on the fuel flow mechanics of a PT 6-A25 engine. Thereafter, Plaintiffs' counsel made no attempt to qualify Rainey as an expert, proffer his testimony, call him as a rebuttal witness or otherwise seek admission of the disputed letter.

The panel of the Eleventh Circuit concluded that the trial court's failure to permit Rainey's hearsay opinion on causation violated the Rule of Completeness embodied in Fed.R.Evid. 106. The panel believed that introduction of Rainey's factual admissions without his opinion on causation created a misleading impression of his position as to the cause of this accident. *See Rainey*, 784 F.2d at 1529, 1530.[18] For the reasons which follow, the court's invocation of Fed.R.Evid. 106 was, we respectfully say, incorrect and a clear departure from the accepted and usual course of judicial proceedings.

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18 The *en banc* Eleventh Circuit agreed with this conclusion by the panel. *Rainey*, 827 at 1500.

A.

Plaintiffs Have Waived Application of Federal Rule of Evidence 106 by Failing to Invoke it at Trial.

Federal Rule of Evidence 106 has no application to this case because it was never invoked by the Plaintiffs. *United States v. Soulard*, 730 F.2d 1292 (9th Cir. 1984). Defense counsel's proposed use of the Rainey letter was well known prior to trial and was the subject of extended discussion. (J.A. 43-48). In fact, Plaintiffs filed a motion in limine to preclude the defense from utilizing the factual admissions contained in Rainey's letter. (J.A. 43; R. 1308). Notwithstanding these discussions, Plaintiffs never raised Fed.R.Evid. 106, nor advised the trial judge of their belief that it would be necessary to introduce Rainey's hearsay opinion on causation in order to place his prior statements in context. This position of silence continued at trial, as Plaintiffs never mentioned Rule 106 during either the direct or cross examination of LCDR Rainey. Moreover, the Plaintiffs did not raise, argue or brief the applicability of Rule 106 on appeal. Thus, as the record affirmatively demonstrates, at no time during these proceedings did Plaintiffs invoke Rule 106 to support admission of Rainey's hearsay opinion.[19]

The plain wording of Fed.R.Evid. 106 indicates that it is not self-executing:

> When a writing or recorded statement or part thereof is introduced by a party, an *adverse party* may require him, *at that time* to introduce any other part or any other writing . . . which ought in fairness to be considered *contemporaneously* with it. (emphasis supplied)

[19] The first time the applicability of Fed.R.Evid. 106 was raised was in the panel opinion of the Eleventh Circuit Court of Appeals. *See Rainey*, 784 F.2d 1529.

According to its facial terms, a party must invoke 106 to gain the protection which it affords. 21 C. Wright & K. Graham *Federal Practice & Procedure* § 5075 ("Like other evidence rules, the completeness doctrine does not automatically apply; it must be invoked by a party"). The invocation of the Rule should be specific, timely, and appear of record, and be made at the time when a writing or part thereof was first used for an allegedly misleading purpose. 21 C. Wright & K. Graham *Federal Practice & Procedure* § 5076 (". . . the request for completeness should be timely even if made after introduction, so long as it was first made when the writing was first utilized for the apparently misleading purpose"). A failure to invoke the protection of Rule 106 waives its application. *United States v. Soulard*, 730 F.2d 1292 (9th Cir. 1984); *Hill v. Nelson*, 676 F.2d 1371 (11th Cir. 1982).

The mission of the Rule is to regulate order of proof by allowing a party to obtain introduction of a document out of turn. 1 J. Weinstein and M. Berger *Weinstein's Evidence* § 106 [01] (1985). If, however, a party fails to move for introduction of an entire document, when one's opponent introduces a part thereof, he will be deemed to have waived application of Fed.R.Evid. 106. *See United States v. Soulard*, 730 F.2d at 1301 (failure to timely object to evidence as being incomplete will result in a waiver of the Rule's application).

In *United States v. Larranaga*, the court refused a party's request to introduce an entire document on re-

direct, where he had failed to invoke Rule 106 when his opponent utilized a portion of the same document during cross examination. In concluding that application of Rule 106 had been waived, the court stated:

> On appeal, the defendant argues that the transcript was admissible under Federal Rule of Evidence 106. This rule provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Fed.R.Evid. 106. Defendant did not follow the procedure outlined in Rule 106 "at that time" when the questions and answer were introduced. Thus, defendant's reliance on Rule 106 is misplaced.

United States v. Larranaga, 787 F.2d 489, 500 (10th Cir. 1986). As this case illustrates, application of Rule 106 is waived unless a party requires his opponent to introduce all relevant portions of a document at the same time.

Having waived application of Rule 106, a party may, of course, attempt to admit other portions of a disputed document. *See* Fed.R.Evid. 106 advisory committee note. At that point, however, the rule of completeness cannot be invoked as a basis for admitting such evidence. This reasoning is expressed by Professors Wright and Graham, who suggest:

> The failure to make a timely request for completeness may prevent the party from predicating error on the failure to enforce Rule 106; it does not, however, bar the party from introducing the explanatory material himself, assuming that the material is admissible at his behest. (emphasis supplied)

21 C. Wright & K. Graham, *Federal Practice & Procedure* § 5076 (1977). In the present case, Plaintiffs made no attempt during the direct examination of Rainey, to invoke Fed.R.Evid. 106. Instead, Plaintiffs opted to wait until cross examination to attempt to introduce Rainey's hearsay opinion on causation. At that point, however, it was incumbent upon the Plaintiffs to demonstrate the admissibility of those statements without reference to Rule 106. At trial, Plaintiffs were simply unable, or by choice unwilling, to present any justification for the admission of a hearsay expert opinion by a lay witness.

While acknowledging technical non-compliance with the terms of Rule 106, Plaintiffs have asserted that they satisfied the spirit of the Rule by attempting to place Rainey's statement in context during cross examination.[20] The actual question and objection involved, however, must be viewed from the perspective of the trial court—since it was the one required to determine its propriety. As the record plainly shows, Plaintiff's counsel simply asked Rainey whether his letter contained an opinion on causation. An objection was made because Rainey had not been qualified to render an opinion on whether the aircraft's free spool turbine engine experienced a pneumatically induced fuel flow malfunction. On this basis the objection was sustained. (J.A. 78). (". . . that doesn't mean you can qualify him for the question you are now asking. The objection is sustained.") (J.A. 77-78). At this point, Plaintiffs' counsel did not attempt to belatedly invoke Fed.R.Evid. 106, nor did he explain to the court that the

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20 See Plaintiffs' Eleventh Circuit *En Banc* reply brief at p. 18.

question was needed for purposes of completeness. If counsel felt it was justified, he should have explained that Rainey's hearsay opinion was not being offered substantively, i.e., to prove the truth of the matter asserted, but was rather being offered only to explain that portion of the letter which he believed had already been offered. Had this been done, the court's ruling may well have been different. In the context of the actual events at trial, however, the court was correct in excluding Plaintiffs' attempt to introduce an unqualified expert opinion through a lay witness. *See Randolph v. Collectramatic, Inc.*, 590 F.2d 844 (10th Cir. 1979) and *Mitroff v. Xomox Corporation*, 797 F.2d 271 (6th Cir. 1986).

However experienced, trial courts do not have crystal balls, and cannot, in the midst of complex litigation discern counsels' unarticulated intentions. For this very reason Federal Rule of Evidence 103 requires an offer of proof following any ruling excluding evidence. Such an offer serves to place specific matters in context and allows the court to view the scope and effect of its ruling.

The trial court's action in excluding Rainey's hearsay opinion simply cannot be properly characterized as an abuse of discretion. *See O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543 (11th Cir. 1984); *Hoover v. Thompson*, 787 F.2d 449 (8th Cir. 1986). To hold otherwise would be completely unfair, and would force trial judges to speculate as to why a particular piece of evidence is being offered prior to making a ruling on its admissibility.

B.

Federal Rule of Evidence 106 is Designed to Govern Order of Proof, it does not Admit Otherwise Inadmissible Evidence.

Federal Rule of Evidence 106 codifies the rule of completeness. *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982). This rule permits a party, when an opponent introduces a document, to have any explanatory portions of the same document introduced at that time. *See* 1 J. Weinstein and M. Berger *Weinstein's Evidence* § 106 [01] (1985). The rule, however, is limited to regulating offer of proof, and cannot be used as a guise to admit otherwise inadmissible evidence. *United States v. Costner*, 684 F.2d 370 (6th Cir. 1982); *United States v. Terry*, 702 F.2d 299 (2d Cir. 1983) *cert. denied*, 461 U.S. 931, 103 S.Ct. 2095, 77 L.Ed.2d 304 (1983); 1 J. Weinstein and M. Berger *Weinstein's Evidence* § 106 [01] (1985); S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* § 49 (3d ed. 1985). As the *Costner* court stated:

> The rule covers an order of proof problem, it is not designed to make something admissible that should be excluded. (citations omitted)

684 F.2d at 373. A party simply may not utilize this rule to admit through the back door evidence which would be excluded at the front. *See United States v. Terry*, 702 F.2d at 314 ("... in any event Rule 106 does not render admissible evidence which is otherwise inadmissible").[21]

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[21] Counsel notes that a conflict does appear to exist as to whether Rule 106 can be utilized to admit otherwise inadmissible evidence. *See United States v. Sutton*, 801 F.2d 1346 (D.C. Cir. 1986).

The Rainey letter was hearsay, and was thus never offered nor admitted as evidence. *See* Fed.R.Evid. 801(c), 802. The defense utilized Rainey's letter on direct examination to exact oral admissions pursuant to Rule 801(d)(2)(A). The Plaintiffs, however, offered no corresponding exception to the hearsay rule to support admission of Rainey's self-serving opinion as to probable cause. Therefore, the Plaintiffs on appeal should be precluded from relying on Fed.R.Evid. 106 to support admission of this opinion. *United States v. Costner,* 684 F.2d at 373; *United States v. Terry,* 702 F.2d at 314.

C.

The Testimony Which Plaintiffs' Counsel Sought to Elicit on Cross Examination Was Not Offered to Explain or Qualify Rainey's Testimony on Direct and Was Therefore Inadmissible.

Federal Rule of Evidence 106 is applicable only when the portions of the document sought to be admitted are necessary to explain or qualify those portions already introduced. *United States v. Walker,* 652 F.2d 708 (7th Cir. 1981); *United States v. Soures,* 736 F.2d 87 (3d Cir. 1984) *cert. denied,* 469 U.S. 1161, 105 S.Ct. 914, 83 L.Ed.2d 927 (1985). Rainey's direct testimony was limited to facts concerning the pilot's state of mind, pressures, and the final flight maneuvers of the aircraft. (J.A. 53-75). At no time was Rainey asked if he had developed an opinion on causation. The answer which Rainey's counsel sought to elicit on cross was beyond the scope of his direct examination and did not tend to explain or qualify Rainey's previous testimony. Instead, Plaintiffs' counsel was simply attempting to elicit from Rainey an opinion which was consistent with his general theory of the case. The admissibility of such testimony cannot be supported by Fed.R. Evid. 106.

In *United States v. Greene,* 497 F.2d 1068 (7th Cir. 1974) *cert. denied,* 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839 (1975), the court refused to admit statements in a letter which were not offered to explain portions already in evidence. In so doing, the court stated:

> On cross-examination, Mrs. Estopinal admitted making the statement in a letter (written after Greene's arrest) that her son was a "happy-go-lucky" type. On re-direct, defense counsel did not ask Mrs. Estopinal to explain what she meant by that statement. Rather, defense counsel asked the witness what else she wrote in this letter without offering the letter into evidence. Defendant contends that the trial court's refusal to permit these questions on redirect violated the doctrine of completeness. Defendant's reliance on the evidentiary rule of completeness is misplaced since the doctrine applies to documents partially admitted into evidence. Here the letter itself was not evidence. In seeking to elicit statements previously made in a document without introduction of the document itself, the defense was actually attempting to introduce a prior consistent statement. . . . Here, any prior consistent statements in Mrs. Estopinal's letter were made *after* a motive to falsify arose. (emphasis in the original, citations omitted)

United States v. Greene, 497 F.2d at 1082. Similarly, in our case, the Rainey letter was never introduced and counsel's question was simply designed to elicit from Rainey a response which he was not properly qualified to give. This opinion testimony was not offered to explain the mental state of the pilots or the final flight maneuvers of the aircraft and was therefore not admissible pursuant to Fed.R.Evid. 106. *See United States v. Marin,* 669 F.2d

73, 84 (2d Cir. 1982) ("completeness doctrine does not, however, require introduction of portions of statement that are neither explanatory of nor relevant to the admitted portions").

III

THE ELEVENTH CIRCUIT MISCHARACTERIZED THE DIRECT EXAMINATION OF COMMANDER RAINEY AND MISCONSTRUED FED.R.EVID. 801(d)(1)(B).

The Eleventh Circuit incorrectly concluded that the defense had utilized the Rainey letter as a prior inconsistent statement pursuant to Rule 801(d)(1)(A). *See Rainey*, 784 F.2d at 1529 (footnote 12) With this false premise as its foundation the Court erroneously found that the Rainey letter should have been admitted as a prior consistent statement. *See* Fed.R.Evid. 801(d)(1)(B). These rules of evidence, however, have no application to the present case, as Rainey's letter was used solely pursuant to Fed.R.Evid. 801(d)(2)(A), as an admission by a party opponent.

Rule 801(d)(1)(A) allows admission of prior inconsistent statements under certain specified conditions. The rule provides in pertinent part:

> . . . (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) *inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury* at a trial, hearing or other proceeding. . . . (emphasis supplied)

Fed.R.Evid. 801(d)(1)(A). This rule of evidence is inapplicable because Rainey had not previously testified;

had uttered no inconsistent testimony on direct; and had not signed the disputed letter under oath. Rainey's testimony on direct was wholly unrelated to this rule.

Having erroneously determined that Rainey was being impeached by a prior inconsistent statement, the Panel concluded that his opinion as to probable cause should have been admitted as a prior consistent statement. Fed. R.Evid. 801(d)(1)(B). This rule provides for admission of a statement if it is:

> (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. . . .

The clear import of this rule indicates that it has no applicability to the testimony of Rainey.

The use of prior consistent statements is only available to rehabilitate witnesses charged with recent fabrications or improper motives. *Hill v. Nelson*, 676 F.2d 1371 (11th Cir. 1982). In this regard the rule is designed to provide a witness with an opportunity to rebut charges of recent fabrication by demonstrating that an earlier statement is consistent with his testimony at trial. 4 J. Weinstein and M. Berger, *Weinstein's Evidence* § 801(d)(1)(B) [01] (1985). In this manner a witness can support the veracity of testimony which has been attacked.

This rule has no application in the present case since Rainey's testimony was entirely consistent with his previous statements. Rule 801(d)(1)(B) only permits the use of prior consistent statements to rehabilitate a witness who has been impeached. *United States v. Weil*, 561 F.2d 1109 (4th Cir. 1977); *United States v. Dennis*, 625 F.2d 782 (8th

Cir. 1980); 4 J. Weinstein and M. Berger, *Weinstein's Evidence* § 801(d)(1)(B) [01] ("Rule 801(d)(1)(B) should apply only when there is some suggestion . . . . that the witness consciously altered his testimony after making the inconsistent statement by which he has been impeached") *Coltrane v. United States*, 418 F.2d 1131 (D.C. Cir. 1969). ("Prior statements . . . are admitted . . . only in those exceptional situations where, as experience has taught, they could be of clear help to the factfinder in determining whether the witness is truthful . . .") In the present case Rainey was never impeached nor charged with a recent fabrication or improper motive. In fact, Rainey affirmed that he had made the factual admissions contained in his letter, and that he believed them to be true. (V.5:60-83). Thus, his trial testimony was entirely *consistent* with his previous statements. Such a scenario offers no predicate for the admission of Plaintiffs' hearsay opinion under the guise of a prior consistent statement.

The Panel's conclusion, to the contrary, improperly approves the use of prior consistent self-serving statements to bolster a party's general theory of the case. *See* 4. J. Weinstein and M. Berger, *Weinstein's Evidence* § 801 (d)(1)(B) [01] (1985). This procedure is improper, as such statements have absolutely no probative value unless they are used to support the veracity of an impeached witness's testimony. *See United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979) *cert. denied*, 434 U.S. 965, 98 S.Ct. 504, 54 L.Ed.2d 450 (1979) and 4 J. Weinstein and M. Berger, *Weinstein's Evidence* § 801(d)(1)(B) [01] (1985).

———o———

CONCLUSION

For its part Petitioner Beech does not seek unlimited or unrestrained use of all reports prepared by or at the behest of the Government. This for the ample reason that the latitude for mischief is too wide and the opportunity for wrong too great. Rather, we seek to use portions of reports and records which not only carry the imprimatur of law but which are demonstrably trustworthy on the record and in the eyes of the Court. Moreover, use of reports should be carefully policed by the trial court to secure to the opponent of the report every safeguard against institutional bias, unreliable evidence or the like.

With regard to the issue of Completeness and the use of prior Consistent Statements, we say in the most respectful terms, that the Court of Appeals' perception and description of Rainey's trial appearance is wrong.

For these reasons, the Court of Appeals should be reversed and directed to order the reinstatement of the District Court's judgment(s).

Respectfully submitted,

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Nos. 87-981, 87-1028, 87-1146
Consolidated

In The

Supreme Court of the United States

October Term, 1987

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES, INC.,
and PRATT & WHITNEY CANADA, LTD.,

vs. *Petitioners,*

JOHN C. RAINEY,

Respondent,

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES, INC.
and PRATT & WHITNEY CANADA, LTD.,

vs. *Petitioners,*

RONDI M. KNOWLTON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER, BEECH AEROSPACE SERVICES, INC.

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QUESTIONS PRESENTED

I. Whether opinions or evaluative conclusions contained in a trustworthy investigative report prepared pursuant to law are admissible pursuant to Federal Rule of Evidence 803(8)(C)?

II. Whether the Eleventh Circuit Court of Appeals misconstrued Federal Rules of Evidence 106 and 801(d)(1)(A) in holding the trial court abused its discretion by refusing to admit an unqualified lay opinion?

PARTIES TO PROCEEDING

All parties having an interest in these proceedings are accurately set forth in BASI's Petition for Writ of Certiorari, p.(i).

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OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit below is reported at 827 F.2d 1498 (11th Cir. 1987). (J.A. 136-178)

The order granting the rehearing *en banc* is reported at 791 F.2d 833 (11th Cir. 1986). (J.A. 134-135)

The original opinion of the Court of Appeals for the Eleventh Circuit is reported at 784 F.2d 1523 (11th Cir. 1986). (J.A. 119-133)

The final judgments for defendants on jury verdicts in the United States District Court for the Northern District of Florida (Pensacola Div.) were not reported. (J.A. 101-103)

JURISDICTION

The *en banc* opinion of the Eleventh Circuit Court of Appeals was entered on September 22, 1987, and reinstated the panel opinion entered on March 25, 1986. Jurisdiction of this Court was invoked under 28 U.S.C. 1254(1) by the filing of a Petition for Writ of Certiorari on December 18, 1987. Review was granted on February 29, 1988.

FEDERAL RULES OF EVIDENCE INVOLVED

1. Federal Evidence Rule 803(8)(C) *Hearsay Exceptions; Availability of Declarant Immaterial* provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(8) *Public records and reports.* Records, reports, statements of data compilations, in any form, of public offices or agencies, setting forth . . .

(C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

2. Federal Evidence Rule 106 *Remainder of or Related Writings or Recorded Statements* provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him, at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

3. Federal Evidence Rule 801(d) *Statements Which Are Not Hearsay* provides:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, ...

* * *

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own

statement, in either his individual or a representative capacity. . . .

STATEMENT OF THE CASE

This case involves two disputed evidentiary rulings in two wrongful death claims being tried before a jury. The issues before this Court are whether Rule 803(8)(C) authorizes admission of opinions or evaluative conclusions contained in trustworthy public reports prepared pursuant to law, and whether Rule 106 may be employed to admit otherwise inadmissible lay opinion testimony.

The Aircraft Accident

Lieutenant Commander (LCDR) Barbara Ann Rainey, a Navy primary flight instructor and her student Ensign (ENS) Donald Bruce Knowlton on July 13, 1982, signed out a T-34C Turbo-Mentor at NAS Whiting Field, Florida. This was Knowlton's fourth familiarization flight, and they were scheduled to practice "touch and go" landings and takeoffs at Middleton Field, Alabama. A "touch and go" is an exercise where the pilot lands, does not stop, takes off and then makes a climbing left turn to join the other aircraft circling the airfield (in a racetrack pattern) for another touch and go landing. There were five other planes in the pattern.

After the fourth landing, the Rainey-Knowlton airplane began its climbing left turn at an altitude lower and speed slower than recommended. The aircraft also made an early turn, and on its existing flight path the

Rainey airplane threatened a mid-air collision and cut out other aircraft already established in the pattern. This prompted radio transmissions from two other aircraft warning Rainey and Knowlton that they were cutting other aircraft out of the pattern. The Rainey aircraft did not transmit a response, but immediately switched to a hard right nose high turn from its left climbing turn. The aircraft lost flying speed and control, rapidly lost altitude, crashed and burned. Both pilots were killed.

Judge Advocate General Investigation Report (JAG Report)

The next day, the Commanding Officer of LCDR Rainey's squadron, pursuant to the requirements of the Judge Advocate General (JAG Manual Chapter VI and Section 0902 Chapter IX), appointed LCDR William C. Morgan, Jr. to investigate the accident and submit a report of the investigation. After a month and a half of investigation, the JAG Report was submitted on September 1, 1982. (J.A. 2) It contained four parts--a "Preliminary Statement," "Finding of Fact," "Opinions" and "Recommendations." The JAG Report was quite thorough and was accompanied by sixty supporting documents, termed "enclosures," consisting of 159 pages. The enclosures included summaries of both pilots' naval flight and medical records, the aircraft's history and inspection records, including an "outstanding maintenance form," air traffic control records, statements of other instructors and students in the "touch and go" pattern as well as other witnesses to the crash, crash crew rescue reports, photographs of the crash site

and wreckage, casualty reports, the engineering investigative report on the engine, statement of the pilots' spouses, diagram of the Middleton Field traffic pattern, and autopsy protocol and toxicology reports on LCDR Rainey and ENS Knowlton.

The report was received, reviewed and approved, without change, by the Commanding Officer of Training Squadron Three, Commanding Officer of Training Wing Five, the Chief of Naval Education and Training, the Chief of Naval Operations, and final approval was given by the Judge Advocate General of the United States Navy. The Report of the Judge Advocate General concluded that nothing was wrong mechanically with the airplane or physically with the pilots but that "[t]he most probable cause of the accident was the pilots [sic] failure to maintain proper inverval" with other aircraft in the traffic pattern. (J.A. 13-14)

Pretrial

LCDR John Charles Rainey and Rondi M. Knowlton, spouses of the crash victims, filed separate diversity actions on April 15, 1983, in the U.S. District Court in Pensacola, Florida. (J.A. 17) They sued the manufacturer of the aircraft, Beech Aircraft Corporation ("Beech"), its engine manufacturer, Pratt & Whitney Canada, Ltd. ("Pratt") and the aircraft maintenance contractor, Beech Aerospace Services, Inc. ("BASI"). The complaint alleged negligence and strict liability for defective design and manufacture, on the part of Beech and Pratt and negligent maintenance of the aircraft engine by BASI.

Specifically, plaintiffs alleged the proximate cause of the crash was a defect in the pneumatic fuel control unit which on occasion would cause an uncommanded loss of power during flight. Defendants denied liability and contended the fatal crash was the result of pilot error. Plaintiffs' cases were consolidated, the issues bifurcated and trial was held only on the issue of liability.

The admissibility of the JAG Report was first addressed at a pretrial conference on March 20, 1984. Plaintiffs admitted the report was a public record, prepared pursuant to a duty imposed by law, and was trustworthy. The trial judge so ruled and initially held that under Rule 803(8)(C), the public records exception to hearsay, only the "Finding of Fact" but not the "Opinions" contained in the JAG Report would be admitted at trial. (J.A. 35) At a hearing the day prior to trial the judge in part changed his ruling and held that certain relevant opinions would be admitted. (J.A. 40) This included LCDR Morgan's opinion that "[t]he most probable cause of the accident was the pilots [sic] failure to maintain proper interval." In light of his new ruling, the judge granted plaintiffs' request for leave to challenge the trustworthiness of the JAG Report, call witnesses in addition to those previously disclosed, offer any evidence that pilot error was not the cause of the accident, and offer additional jury instructions concerning the JAG Report. (J.A. 41-42) Opting to proceed with trial, plaintiffs did not move for a continuance nor did they at any time move for a mistrial, or seek any other protective or remedial relief.

Trial

The only disputed issue during the two-week trial was the cause of the fatal crash. During defendants' case in chief, pertinent findings of fact and opinions from the JAG Report were admitted into evidence. (J.A. 79-97) Plaintiffs never, by witness or otherwise, sought to challenge the trustworthiness of the JAG Report, or that it was a "public record made pursuant to authority granted by law," or that it fell within the public records exception to hearsay, Rule 803(8)(C). Their sole objection was that opinions in the report were inadmissible under the narrow interpretation of the Rule.

Both sides relied heavily on the opinion of expert witnesses, and defendants relied in part on the following evaluative conclusions or opinions from the JAG Report (J.A. 97):

1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

***

7. The most probable cause of the accident was the pilots' [sic] failure to maintain proper interval.

During trial LCDR John C. Rainey was called by Beech to testify as an adverse witness. On direct examination he was questioned concerning the letter he had written to the JAG investigator, LCDR Morgan. (J.A. 54-75) The questions to Rainey on direct were strictly limited to objective facts involving unnecessary pressure on the pilots prior to the flight and the final flight maneuver of the aircraft prior to the crash. During direct examination of Rainey by Beech, he was never asked if his letter contained an opinion as to the cause of the accident. On cross-examination, Rainey's own counsel asked: "In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably [sic] primary cause of this mishap was rollback?" (J.A. 77) The trial judge sustained the defendants' objection on the grounds that Rainey had not been qualified as an expert witness and therefore, could not express an opinion. (J.A. 77-78) No effort was made by Rainey's counsel, either at that time or during plaintiffs' case in rebuttal, to elicit Rainey's qualifications and experience as a pilot nor to tender him as an expert on any subject. Nor was there any attempt by any party at any time to offer the letter or any part of it into evidence. The letter appears in the record for the first time only as an exhibit to Rainey's Memorandum in Support of his Motion for New Trial. (J.A. 104) There was no proffer of any of this evidence, no motion for mistrial or continuance, or other curative effort on the part of Rainey's counsel.

The trial on liability consumed two full weeks. Witnesses testified in person, by video tape, and by deposition concerning the accident, design and development

of the T-34C aircraft and the Pratt engine, maintenance procedures, and other incidents in which "rollback" was alleged to have occurred. On July 20, 1984, the jury returned a verdict for defendants. (J.A. 98-100)

Appeal

After a timely Motion for New Trial was denied by the trial judge, Rainey and Knowlton sought a review by the Eleventh Circuit Court of Appeal. On March 25, 1986, a panel of that court held that the district court had committed reversible error in the two evidentiary rulings discussed above. (J.A. 119) The court agreed with the trial judge that the JAG Report was trustworthy and acknowledged that the prevailing view in sister courts favored admissibility under Rule 803(8)(C) of evaluative conclusions contained in public records. The Eleventh Circuit panel concluded, however, that it was bound to apply the narrow interpretation of "factual findings" set forth in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980) to hold the opinion portion of the JAG Report was improperly admitted.

Despite the fact that Rule 106 was raised for the first time by the Eleventh Circuit in its opinion, it also held the cross-examination of Rainey was improperly restricted and remanded the case for a new trial. In a specially concurring opinion, Circuit Judge Johnson noted that *Smith* "is an anomaly among the circuits" and urged reconsideration by the full court of the admissibility of evaluative conclusions under Rule 803(8)(C).

On May 27, 1986, a rehearing *en banc* was granted. (J.A. 134) Following submission of additional briefs on the issues, by opinion dated September 22, 1987, the Eleventh Circuit split six-six on the issue of the admissibility of evaluative conclusions contained in a trustworthy public record. (J.A. 136) The court concurred with the ruling on Rainey's cross-examination and reinstated the original panel's decision remanding the case for a new trial. The Petition to this Court for a Writ of Certiorari to review these two evidentiary rulings was filed on December 18, 1987. Review was granted on February 29, 1988.

SUMMARY OF ARGUMENT

A. Opinions in trustworthy public reports are admissible under Federal Rule of Evidence 803(8)(C).

This case involves the admissibility of opinions contained in a Report of the Judge Advocate General (JAG Report) on the cause of an aircraft accident killing a Navy flight instructor and student. The JAG Report was admitted into evidence under the public records and reports exception to hearsay, Fed.R.Evid. 803(8)(C). The JAG Report was trustworthy and otherwise unchallenged by the survivors of the two pilots who sued Petitioners.

Historically, in conceiving the Rule the House Committee intended a narrow application of the term "factual findings" to exclude from evidence opinions contained in public records and reports. The Senate

and Advisory Committee strongly disagreed and urged a *broad* interpretation of the Rule to admit opinions and evaluative conclusions from public reports into evidence.

Legal scholars on evidence uniformly urge the use of the *broad* interpretation of the Rule to admit opinions of the public officer or agency making the investigation as required by law. Subsequent to its adoption in 1974, all circuits (including the Fifth Circuit) applied the broad interpretation of the Rule admitting opinions contained in a trustworthy public report. These include opinions or "evaluative conclusions" from reports of the CDC, EEOC, FAA, JAG, Coast Guard, and FCC to reports of highway patrolmen as to the cause of an accident.

In the case *sub judice*, the Eleventh Circuit, having been formed from the old Fifth Circuit, felt bound by the Fifth Circuit case of *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980). Only *Smith* adopted the narrow construction, excluding from evidence opinions contained in trustworthy public records and reports. This is despite at least three pre-*Smith* and at least four post-*Smith* opinions rendered by the Fifth Circuit to the contrary.

Legal scholars and Circuit Courts of Appeal recognize the policy considerations behind the broad application of the Rule. These include reliability, time, necessity, value, and harmony within the Federal Rules. The prevailing view favors admissibility in the first instance and places the burden on the party opposing the report to demonstrate it is untrustworthy.

Untold public financial and human resources are devoted to investigations which involve an unlimited spectrum of problems from discrimination complaints to accident investigations. Eliminating the use of these invaluable resources in relevant civil proceedings eradicates the advances which have enriched this country over the past decades of enlightened justice and social progress.

B. Federal Rule of Evidence 106 is not designed to make admissible that which is inadmissible.

Rule 106 requires, upon admission into evidence of a part of a document by a party, such additional *admissible* portions that in fairness reflect the complete context of the part admitted. The purpose of the Rule is destroyed if it is used to admit evidence that is otherwise inadmissible.

Plaintiff Rainey was called as an adverse witness by Beech. On direct examination he was asked about factual matters concerning the pilots' pre-flight activities and the final maneuver of the aircraft leading to the fatal crash. The Eleventh Circuit erroneously concluded that Beech's counsel questioned Rainey and elicited two damaging statements contained in a letter Rainey wrote to the JAG investigator. These statements acknowledged a violation of traffic pattern integrity and a premature turn without proper interval by his wife's aircraft. These statements, however, were *not* presented to the jury.

On cross-examination, Rainey's counsel announced to the jury, in the form of a leading question, Rainey's

opinion that the cause of the accident was engine failure. Beech's objection on the ground Rainey had not been qualified as an expert was sustained. The Eleventh Circuit, having misapprehended the jury's exposure to Rainey's two damaging statements, applied Rule 106 to avoid what is perceived to be an "unfairness inherent in 'the misleading impression created by taking matters out of context.' " (J.A. 130)

The inescapable effect of the court's use of Rule 106 creates a tactical vehicle to make admissible unqualified lay opinion testimony which is otherwise inadmissible. Rule 106 controls only the order in which proof is presented and must be positively invoked at the time the writing is first offered or it is waived. Rule 106 was not invoked during trial, or during the appellate process by Rainey and Knowlton. It appeared for the first time in the Eleventh Circuit's opinion. (J.A. 130) This was untimely and clearly error.

The jury was not exposed to Rainey's damaging admissions. The substance of the facts actually submitted to the jury did not constitute a prior inconsistent statement and Rule 801(d)(1)(A) and (B) simply do not apply.

ARGUMENT

A. Opinions or evaluative conclusions contained in a trustworthy investigative report prepared pursuant to law are admissible pursuant to Federal Rule of Evidence 803(8)(C).

The sole issue for the Court's determination, under this point, is whether opinions or evaluative conclusions contained in the JAG Report are admissible under the public records and reports exception to the hearsay rule. In material part, Fed.R.Evid. 803(8)(C) *Hearsay Exceptions; Availability of Declarant Immaterial* provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (8) *Public records and reports.* Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth . . .
>
> (C) in civil actions and proceedings . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Rainey and Knowlton have not contested any qualifying element of the JAG Report other than the admissibility of opinions contained in the report. The only basis for their assault is that opinions or evaluative conclusions do not fall within the narrow definition or intended meaning of the term "factual findings." The court split six-six on the issue. Six judges felt bound by the Fifth Circuit's opinion in *Smith v. Ithaca Corp.*,

612 F.2d 215 (5th Cir. 1980)[1] which required reinstatement of the panel opinion. Nine other Circuit Courts of Appeal and decisions before and after *Smith* in the Fifth Circuit join all legal commentators and disagree with *Smith*. Opinions and evaluative conclusions contained in trustworthy public records and reports are admissible under the broad interpretation of the Rule adopted by an overwhelming majority of the courts and all legal scholars on evidence.

Legislative History

While BASI believes opinions and evaluative conclusions are clearly within the definition of a finding,[2]

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[1] The Eleventh Circuit was formed in 1981 by separating Florida, Georgia and Alabama from the Fifth Circuit Court of Appeals. The Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

[2] A "finding" is a "decision upon a question of fact reached as the result of a judicial examination or investigation by a court, jury, referee, coroner, etc." Black's Law Dictionary 569 (5th ed. 1979). It also "commonly applies to any statement of fact that represents a conclusion on the part of any investigator. * * * The language of 803(8)(C) literally provides for the admission of entire agency reports so long as those reports include, *inter alia*, factual findings. . . ." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1143-44 (E.D.Pa. 1980), *aff'd in relevant part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

resort to the legislative history of the Rule reveals the source of the dispute. It also illuminates the solid foundation, purpose and logic supporting a liberal interpretation of the Rule.

The House Judiciary Committee when approving Fed.R.Evid. 803(8)(C) stated its intention was to strictly construe the term "factual findings" to exclude evidence of evaluations or opinions. Report of the Committee on the Judiciary, H.R. Rep. No. 650, 93d Cong., 1st Sess. 14 (1973), *reprinted in* 1974 U. S. Code Cong. & Admin. News 7051, 7075, 7088. The Senate Committee on the Judiciary agreed with the Advisory Committee's interpretation. The Senate Committee strongly disagreed and rejected the narrow interpretation of the House, stating:

> The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. §78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C.§269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of

> Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

Report of the Committee on the Judiciary, S. Rep. No. 1277, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7064-65. Congress enacted the legislation without changing the language, however, the Conference Committee failed to address the scope of Rule 803(8)(C) as it relates to admissibility of opinions or evaluations.

Commentary By Legal Scholars

BASI's research for comments by legal scholars on evidence has revealed uniform support for the admission into evidence of opinion or evaluative conclusions contained in public records and reports that qualify under Rule 803(8)(C). The following brief summary of comments by authors of recognized treaties demonstrates the consistencies of their views:

4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶803(8)[03] at 803-251 (1985)	Rule 803(8) should be interpreted in accord with the treatment of "opinion" evidence. If the report states a conclusion that would be helpful – and is reliable – it should be admitted.

McCormick, *Evidence* §316, at 890-891 (3d ed. 1984)

> The trend . . . has been to recognize that much useful evidence is to be found in investigative reports, with impetus from the many statutory enactments providing for admissibility. * * * The case for liberal construction is strong.

4 D. Louisell & C. Muller, *Federal Evidence* §455 at 741 (1980)

> [T]he Report of the Senate Judiciary Committee . . . specifically endorsed the receipt of "evaluative reports," preferring to rely upon the "trustworthiness" provision to exclude public records of this sort if warranted under particular circumstances. And the Advisory Committee itself drafted the language ultimately enacted in Rule 803(8)(C), plainly intending to include "evaluative" materials. It is these latter interpretations which should control the construction of clause (C), ...

M. Graham, *Handbook of Federal Evidence* at 844 and 848 (2d ed. 1986)

> [D]isagreement existed at common law as to the admissiblity of such "evaluative" reports. The approach taken in Rule 803(8)(C) is to provide for admissibility unless the

> sources of information or other circumstances indicate lack of trustworthiness. * * * The Report of the Senate Committee advances the preferred position.

G. Lilly, *An Introduction to the Law of Evidence* §7.19 at 273 and 275-276 (2d ed. 1987)

> Admission here is justified, if at all, by the probability that the officials conducting the investigation (who themselves are under a public duty) will be careful and discriminating in selecting the factual data upon which to rely in reaching their findings and conclusions. * * * This receptive approach recognizes that the value of investigative reports often lies in their conclusions which are not, strictly speaking, purely factual.

R. Lempert & S. Saltzburg, *A Modern Approach to Evidence* §3 at 449-50 (2d ed. 1982)

> In our view the Senate has the better of this dispute. * * * Thus, if an official investigation into the cause of an airplane crash concludes that the crash resulted from pilot error, the report would probably be admissible under the public records exception.

Policy Considerations

It is the soundness of the policies which underlie the broad application of this Rule which speak most strongly in favor of admissibility. These principles center on reliability, time, necessity, value, and the harmonious spirit of the Federal Rules of Evidence.

Reliability is a most important basic policy consideration. The Advisory Committee observed that the Rule is premised on "the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." Fed.R.Evid. 803(8)(C) Advisory Committee's Note citing *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir. 1952). Most investigators under a public duty lack a motive to distort the facts or their conclusions. In *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir. 1984), the court held that:

> "Admissibility in the first instance" is assumed because of the reliability of the public agencies usually conducting the investigation, and "their lack of any motive for conducting the studies other than to inform the public fairly and adequately." Kehm v. Procter & Gamble, 724 F.2d 613, 618, 619 (8th Cir. 1983).

The *Ellis* court cited with approval the case of *United States v. American Tel. & Tel. Co.*, 498 F.Supp. 353 (D.D.C. 1980):

> The rationale for the admissibility of factual findings contained in public records, as explained in the cases cited above, lies in their *fundamental trustworthiness.* The guarantee of trustworthiness does not necessarily reside in the contents of the records, be they facts or conclusions, but rather in their source. "[P]ublic records or reports, by virtue of their being based on legal duty and authority, contain sufficient circumstantial guarantees of trustworthiness to justify their use at trial."
>
> Since the reliability of the factual findings results essentially from the fact that the public official concerned is pursuing an investigation authorized by law, *there is no reason not to admit the findings simply because they tend towards the conclusionary rather than the factual,* and, unless, as Rule 803(8)(C) further provides, the sources of information or other circumstances indicate lack of trustworthiness. (emphasis in original)

See also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1144 (E.D.Pa. 1980), *aff'd in relevant part,* 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Counsel for Rainey and Knowlton admitted prior to the pretrial conference of March 20, 1984, that the Report of the Judge Advocate General was prepared pursuant to law and there was absolutely no evidence to impugn its trustworthiness. LCDR Morgan's duty was to the United States Navy, and he had no motive to distort the facts or his conclusions. By virtue of no challenge by the plaintiffs, both the trial judge and the court below held the report was trustworthy.

Time was identified by Dean McCormick as an important factor in urging admission of the investigator's conclusions based on his prompt start and fresh exposure to witnesses and other evidence.

> The most important reason is *time.* The officer comes on the scene usually as early as it is feasible

> to get there. Usually the investigators of the parties come later and the statements are frequently partial and one-sided. The witnesses at the trial have often only a dim recollection of the event, and their testimony rests mostly on their pre-trial refreshment of memory by these statements. The officer is often able to interview witnesses before they have been pulled one way or the other by the parties. The officer, too, is frequently a specialist – a doctor reporting death, a fire marshall investigating a fire – or at least experienced in like investigations, such as a highway patrolman reporting on a collision. (emphasis added)

McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?* 42 Iowa L.Rev. 363 (1957).

In the instant case LCDR Morgan's appointment came the day after the accident. The sixty enclosures attached to his report demonstrate the thoroughness of his investigation. The report itself was completed September 1, 1982, 50 days after the accident and long before legal proceedings were initiated.

Necessity forms the foundation for another policy reason favoring the admission of evaluative conclusions in reports. Acceptance of investigative reports in lieu of the testimony of public officials not only simplifies legal proceedings but avoids disruption of the administration of public affairs at all levels of government. Requiring the public official to testify as a foundation to introduce the records and reports would be most cumbersome, expensive and time-consuming and almost certainly would create a class of official witnesses. The Rule provides that the appearance of the public official is necessary only when the party opposing admission of

the report challenges it as untrustworthy. The reasoning is explained in *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301-302 (4th Cir. 1984):

> Placing the burden on the opposing party makes considerable practical sense. Most government sponsored investigations employ well accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered. Rather than requiring the moving party to spend considerable time and money to ensure that the experts who conducted the study are available at trial, it is far more equitable to place that burden on the party seeking to demonstrate why a time tested and carefully considered presumption is not appropriate.
>
> * * *
>
> The burden rested with Playtex, however, not Ellis, to demonstrate that the methodology was flawed. The hearsay exception assumes regularity of procedure absent a showing to the contrary. See generally Weinstein Evidence ¶¶803(8)[01] and [03]. Thus, whether the declarant or the investigator was available to testify about the methodology or whether the report stated its methodology, are not by themselves, reasons to exclude the studies.

Rainey and Knowlton, after agreeing the JAG Report was trustworthy, thereafter never attempted to challenge the report. They knew for months prior to trial defendants fully intended to offer the JAG Report into evidence. Yet they made no effort to depose or call LCDR Morgan.

Valuable human and financial resources devoted to public investigations required by law are also essential considerations. These include exhaustive

studies and reports performed by such public agencies and officers as the Center for Disease Control, Equal Employment Opportunity Commission, Federal Aviation Administration, Federal Bureau of Investigation, Coast Guard and Reports of the Judge Advocate General. They cover the spectrum from scientific studies to accident investigations to the merits of discrimination claims. Very substantial sums of money and untold human hours are devoted to them. The Rule recognizes that their reliability and the value of their admissibility would be inexcusably wasted if these evaluative reports could not be admitted into evidence. The Fifth Circuit in *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157 (5th Cir. 1972), considered the admissibility of an EEOC report under the Federal Business Records Act, a predecessor of the current rule. The reasoning applied there remains sound:

> The Commission's decision contains findings of fact made from accounts by different witnesses, subjective comment on the credibility of these witnesses, and reaches the conclusion that there is reasonable cause to believe that a violation of the Civil Rights Act has occurred. Certainly these are determinations that are to be made by the district court in a de novo proceeding. We think, however, that to ignore the manpower and resources expended on the EEOC investigation and the expertise acquired by its field investigators in the area of discriminatory employment practices would be wasteful and unnecessary.

The record is devoid of evidence challenging the methodology LCDR Morgan employed in conducting his investigation in accordance with the JAG manual and arriving at his opinions. The trial court recognized the

value of the opinions contained in the Report of the Judge Advocate General and most properly admitted the report into evidence.

Harmony is the foundation upon which the Federal Rules of Evidence are based and interpreted. To do otherwise would completely frustrate the purpose of the rules. To attach a severely restricted significance to the term "factual findings," as required by the narrow interpretation of the Rule, is inconsistent with the other Federal Rules of Evidence. The broad application of Rule 803(8)(C) to permit the introduction of evaluative reports corresponds with Fed.R.Evid. 703 and 704. Rule 703 provides that the facts forming the basis of an expert's opinion need not themselves be admissible as long as they are "of a type reasonably relied upon by experts in the particular field." *See also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1148 (E.D.Pa. 1980), *aff'd in relevant part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Fed.R.Evid. 704 provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Public records are excepted from the hearsay evidence rule because they are presumed reliable. The reliability of a particular evaluative report can be tested either with the trustworthiness challenge embodied in Rule 803(8)(C), or with objections permitted by Fed.R.Evid. 702 and 705. Rule 702 permits objections to the qualifications of an expert, and Rule 705 authorizes disclosure on cross-examination of facts and data underlying an expert's testimony. The harmonious

interplay of Rules 702 and 705 with Rule 803(8)(C) was discussed in *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir. 1978), where the Third Circuit noted:

> The objections permitted by Rules 702 and 705 provide a means of testing their reliability. Before these objections may be recognized, however, the party challenging the validity of an official report admitted under 803(8)(C) must come forward with some evidence which would impugn its trustworthiness. [Citation omitted.] To allow objections to be sustained under Rules 702 and 705 without a showing of untrustworthiness would have the practical effect of nullifying the exception to the hearsay rule provided by Rule 803(8)(C).

In *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 304 (4th Cir. 1984), the court, without citation to Rule 705, discussed the underlying relationship between Rules 705 and 803(8)(C):

> In an era when scientific data is playing an increasingly important role at trial, they argue, there is no reason not to let the jury see and evaluate the same data that the experts – whether they be doctors or other specialists – are relying on to reach their conclusions.

The trial court, by admitting the findings and the relevant opinions in the JAG Report, permitted the jury to see what data Morgan had relied upon to reach his conclusions. Just as with the witnesses who testified at trial regarding the cause of the crash, the jury could give those opinions whatever weight it deemed they deserved.

Analysis of *Smith v. Ithaca*

Rainey and Knowlton based their objections to the opinion portion of the JAG Report entirely on the strength of *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980). The Eleventh Circuit felt bound by the precedent of its parent court set forth in *Smith* to hold the admission was error.

Smith, the sole authority relied upon by the Eleventh Circuit, is an isolated departure from the traditional approval by the Fifth Circuit in admitting evaluative conclusions under Rule 803(8)(C) and its predecessor. *Smith*, as observed by the Eleventh Circuit, is not only "an anomaly among the circuits," *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1530 (11th Cir. 1986), but it is an anomaly in the Fifth Circuit itself.

An early Fifth Circuit case on point is *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972), where the court approved admission of an EEOC report which contained the results of the investigation including factual findings and a conclusion of probable cause that violations existed. In *Smith v. Universal Services*, the Fifth Circuit specifically rejected the argument that the report was inadmissible because it contained evaluative or conclusionary findings as to probable cause. In *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975), the court held that FAA advisory materials which contained evaluative conclusions were relevant to the issue of negligence and admissible into evidence. *See also Hodge v. Seiter*, 558

F.2d 284 (5th Cir. 1977), (HUD investigative report properly admitted).

Smith v. Ithaca Corp., 612 F.2d 215 (5th Cir. 1980), is of no precedential value. A number of other Fifth Circuit cases were rendered subsequent to it in which public reports qualifying under Rule 803(8)(C) were admitted into evidence. In *Mac Towing, Inc. v. American Commercial Lines*, 670 F.2d 543 (5th Cir. 1982), an entire Coast Guard accident report was admitted which attributed all of the blame for a collision to one vessel. Other Fifth Circuit cases of note include *McClure v. Mexia Independent School District*, 750 F.2d 396 (5th Cir. 1985) (EEOC probable cause determination properly admitted); *Local Union No. 59 v. Namco Electric, Inc.*, 653 F.2d 143 (5th Cir. 1981) (NLRB investigative report evaluating allegations admissible); and *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 499 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981) (error to exclude EEOC investigative determination).

There is absolutely no justification within the Fifth Circuit why *Smith v. Ithaca Corp*, 612 F.2d 215 (5th Cir. 1980), can serve as controlling authority in light of all other decisions to the contrary. *Smith* is not only a maverick within the Fifth Circuit, but stands alone as authority in the deadlock below for the narrow interpretation of the term "factual findings" in Rule 803(8)(C) to exclude opinions and evaluative conclusions from evidence.

Additional Considerations

The line of logic running from the Advisory Committee's Notes through the legislative history to

the commentators and cases interpreting the Rule supports the broad application of the Rule to permit admission of evaluative conclusions. The policy considerations underlying the *broad* construction are sound. To hold otherwise would require trial judges to make hairsplitting fact/opinion determinations which have been consistently rejected in other areas as unworkable. Clear-cut distinctions between fact and opinion are often impossible to draw, and the volume of cases requiring appellate review on this issue would drastically increase. As Dean McCormick observed, the fact/opinion differentiation has "proved to be the clumsiest of all tools furnished the judge. . . ." McCormick, *Evidence* §11 at 27 (3d ed. 1984).

To restrict the use of evaluative reports will render impotent the time-proven value of public agency investigative reports and result in a waste of the valuable human and financial resources behind them. The following table demonstrates the breadth of the acceptance of evaluative conclusions throughout the Circuits and the variety of public reports in which they may be found:

Circuit	Case	Ruling
First	*Robbins v. Whelan*, 653 F.2d 47 (1st Cir. 1981), *cert. denied*, 454 U.S. 1123, 102 S.Ct. 972, 71 L.Ed.2d 110 (1981)	Error to exclude **National Highway Safety Board** report which included evaluative conclusions.

Second	*Litton Systems, Inc. v. American Telephone & Telegraph*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984)	**FCC** reports containing evaluative conclusions were properly admitted.
Third	*Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978), *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978)	Report of **Coast Guard** including evaluative conclusions were admissible in Jones Act litigation.
	Melville v. American Home Assurance Co., 584 F.2d 1306 (3d Cir. 1978)	**FAA** materials containing evaluative conclusions were admissible.
	Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238 (3d Cir. 1983) rev'd on other grounds 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed 2d 538 (1986)	Error to exclude evaluative conclusions on trade practices in **Treasury Department report.**
Fourth	*Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984)	Error to exclude **CDC** and state health department reports containing evaluative conclusions and statistical findings.

Fifth	*Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975)	**FAA** advisory materials including evaluative conclusions were properly admitted.
	Mac Towing, Inc. v. American Commercial Lines, 670 F.2d 543 (5th Cir. 1982)	Contents of **Coast Guard** report establishing fault were admissible.
Sixth	*Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 993, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979)	Evaluative conclusion in **Highway Patrol** report was admissible.
	In Re: Paducah Towing Co., Inc., 692 F.2d 412 (6th Cir. 1982)	**Administrative Law Judge's** conclusions with respect to reasonableness of a tug boat captain's actions were properly admitted.
Seventh	*Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986)	**EEOC** report containing evaluative conclusions were properly admitted.
Eighth	*Kehm v. Proctor & Gamble*, 724 F.2d 613 (8th Cir. 1983)	**CDC** studies containing evaluative conclusions on causes of toxic shock syndrome properly were admitted.

Ninth	*Plummer v. International Hotels Co.*, 656 F.2d 502 (9th Cir. 1981)	Error to exclude **EEOC** report containing evaluative conclusion of probable cause of discrimination.
Tenth	*Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986)	**Shooting Review Board** report containing evaluative conclusions that police officer acted within department guidelines was properly admitted.

The rapidly increasing quantity and variety of public records containing evaluative conclusions will be a valuable resource to the courts of this nation. The broad application of Rule 803(8)(C), which contains safeguards to prevent admission of unreliable evidence, will assist all courts in a more efficient administration of justice. The instant case involves an accident investigation, but if the narrow interpretation of Rule 803(8)(C) is adopted, the far-reaching effect will be felt in many other types of litigation. This notably would include discrimination and civil rights actions which for years have depended upon reports containing evaluative conclusions as to probable cause. This will cripple the advancement of social reform and justice which our country has enjoyed in recent decades.

BASI respectfully urges the Court to approve the admission of the evaluative findings contained in the JAG Report and reverse the decision of the Eleventh Circuit Court of Appeals.

B. The Eleventh Circuit Court of Appeals misconstrued Federal Rules of Evidence 106 and 801(d)(1)(A) in holding the trial court abused its discretion by refusing to admit an unqualified lay opinion.

Rainey was called by Beech as an adverse witness and questioned about factual matters contained in a letter Rainey had written to JAG investigator LCDR Morgan. Rainey had not been and never was qualified as an expert. Rainey's counsel on cross-examination asked Rainey if he stated in the letter that the most probable cause of the accident was engine malfunction. Beech promptly objected on the ground Rainey had not been qualified as an expert. The trial judge sustained the objection, (J.A. 77) and the Eleventh Circuit reversed and awarded a new trial. The Eleventh Circuit was motivated by an *erroneous* assumption that two damaging statements by Rainey in paragraph four of his letter (that his wife had committed pilot error) had been presented to the jury by Beech on direct examination. However, this evidence was *not* presented to the jury. Erroneously concluding the damaging admissions of Rainey in the letter had been submitted to the jury, the Eleventh Circuit improperly applied Fed.R.Evid. 106 and 801(d) as grounds for a new trial.

LCDR John C. Rainey, after making his own inquiry, wrote an undated letter to JAG investigator LCDR Morgan. The subject of paragraph four of Rainey's letter was a conclusion that "the aircraft piloted by his wife violated pattern integrity . . . as it turned crosswind without proper interval." *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1527 (11th Cir.

1986). This was obviously contrary to his theory that the cause of the accident was engine malfunction.

The basis for the Eleventh Circuit's ruling that it was reversible error to exclude Rainey's unqualified opinion on the cause of the accident is as follows:

> Another issue raised by this appeal is whether the district court improperly restricted Rainey's trial testimony. A. H. Toothman, counsel for Beech Aircraft Corporation, called Rainey as an adverse witness. Rainey was questioned about the letter he had written to Lieutenant Commander Morgan about the "aircraft mishap." The questions concerned paragraphs two and four of the letter. In paragraph two, Rainey had written that before the training exercise, his wife, Lieutenant Commander Rainey, was under "unnecessary" pressure. According to Rainey, his wife had attempted to cancel the exercise "[o]n three separate occasions," and "was observed to terminate [one] conversation in an uncharacteristically heated and disgusted manner." *In paragraph four, Rainey had written that the aircraft piloted by his wife violated pattern integrity . . . as it turned crosswind without proper interval."* Rainey had also admitted that either his wife or Ensign Knowlton "react[ed] instinctively and abruptly by initiating a hard right turn, away from [the aircraft piloted by Lieutenant Colonel Habermacher]." Because these statements tended to support the defendants' theory that pilot error led to the crash, the district court, over Rainey and Knowlton's objection, permitted Mr. Toothman's inquiry. (emphasis added)

Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1528 (11th Cir. 1986). It is essential to remember that the italicized portion of the court's opinion above constitutes a misunderstanding of what was published to the

jury from the letter. This evidence was not presented to the jury in any form.

Rainey was not questioned by Beech about paragraph five of the letter which set forth his conclusion that the probable cause of the accident was an engine malfunction. On cross-examination Rainey's counsel made a statement of Rainey's opinion as to the cause of the accident in the form of the following question: "In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably [sic] primary cause of this mishap was roll-back?" (J.A. 77) Beech's counsel promptly objected on the ground probable cause constituted an opinion and Rainey had not been qualified as an expert. (J.A. 77) The objection was sustained, and Rainey's counsel went no further. Rainey and Knowlton must not have been too concerned about the probative value of Rainey's undated letter because it was not offered or proffered in evidence at trial. It first appears in the record as an exhibit to their Motion for New Trial. (J.A. 104)

The court, having incorrectly assumed the references to air traffic violations were heard by the jury, concluded that Rainey's lay opinion as to the cause of the accident "would have placed the prior statements in context and clearly rebutted the misleading impression created by the prior statements alone." (J.A. 131) The court went on to state:

> The [trial] court, therefore, erred in permitting the defendants to examine Rainey about portions of his letter while prohibiting cross-examination about other relevant portions. Because paragraph five of the letter would have harmonized the prior

> statements with Rainey's stance at trial, the jury was given an incomplete and misleading impression of Rainey's position. Under the "rule of completeness" embodied in Rule 106, the limitation of Rainey's testimony was thus inherently unfair and an abuse of discretion. Rainey and Knowlton are entitled to a new trial. (J.A. 131-132)

Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1529-30.

Rule 106

With this as a foundation and despite the fact that the letter was never introduced or proffered and Rainey was never qualified as an expert, the Eleventh Circuit applied what it termed "the *concerns* of the Rule – fairness and completeness – to this case." *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1529. (J.A. 130) The court explained its reasoning for relying on Fed.R.Evid. 106 as:

> Federal Rule of Evidence 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106 is based on the "rule of completeness," and seeks to avoid the unfairness inherent in "the misleading impression created by taking matters out of context." (J.A. 130)

Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1529. In footnote 11, the court said:

> Technically, Rule 106 is limited in its application to instances when a party introduces a writing or recorded statement into evidence. Here, we find

> the defendants' questions concerning Rainey's letter tantamount to the introduction of the letter into evidence. We therefore apply the *concerns* of the Rule – fairness and completeness – to this case. (emphasis added) (J.A. 130)

Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1529 (11th Cir. 1986).

This application of Rule 106 in the manner used by the court below fractures the very purpose and intent of the rule. Rule 106 controls only the order of *admissible* proof. It clearly is not intended to transform inadmissible evidence into that which is admissible. This interpretation of Rule 106 was aptly expressed by the Sixth Circuit in *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1980):

> The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded. [Citing cases.]

A party may not use Rule 106 as a vehicle for admitting otherwise inadmissible testimony. *See also United States v. Burreson*, 643 F.2d 1344 (9th Cir. 1981); *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983), ("[I]n any event, Rule 106 does not render admissible evidence that is otherwise inadmissible.") This, however, is the unintended but inescapable result of the Eleventh Circuit's misuse of Rule 106. Permitting a party to offer an opinion when he has demonstrated no expertise on the subject matter, and where there is no evidence before the jury to invoke the doctrine of completeness, absolutely destroys the spirit of fairness Rule 106 espouses. To the contrary, it creates a tactical device for admitting a lay opinion in the case *sub*

judice. It also provides a manner in other cases for the admission of otherwise inadmissible evidence.

Rule 106 is also not applicable in the case at hand because Rainey's opinion was not offered to explain or qualify those portions of the letter about which Rainey was questioned on direct examination. Fed.R.Evid. 106 is only applicable where the portions of a document sought to be admitted are relevant to the issues, and are necessary to explain or qualify those portions of a document already admitted. *United States v. Walker*, 652 F.2d 708 (7th Cir. 1981). The direct examination of Rainey focused on factual matters relating only to the pilots' pre-flight activities and the final flight maneuver of the aircraft. In Beech's examination, there was no inquiry concerning the cause of the crash. When his own counsel sought to elicit such an unqualified opinion from Rainey, no part of the letter had been admitted. This testimony did not tend to explain or qualify any part of the letter or Rainey's previous testimony. It also was clearly beyond the scope of direct examination. The admissibility of this testimony cannot be justified by Rule 106 or any other theory.

In a similar situation, the court in *United States v.Greene*, 497 F.2d 1068, 1082 (7th Cir. 1974), refused to admit statements in a letter which were not offered to explain portions already in evidence. In so doing, the court stated:

> On cross-examination, Mrs. Estopinal admitted making the statement in a letter (written after Greene's arrest) that her son was a "happy-go-lucky" type. On re-direct, defense counsel did not ask Mrs. Estopinal to explain what she meant by this statement. Rather, defense counsel asked the witness what else she wrote in that letter without offering the letter into evidence. Defendant contends that the trial court's refusal to permit these questions on redirect violated the doctrine of completeness. Defendant's reliance on the evidentiary rule of completeness is misplaced since the doctrine applies to documents partially admitted into evidence. Here the letter itself was not evidence. In seeking to elicit statements previously made in a document, without introduction of the document itself, the defense was actually attempting to introduce a prior consistent statement. . . . Here, any prior consistent statements in Mrs. Estopinal's letter were made *after* a motive to falsify arose. . . . (emphasis in original) [Citations omitted.]

Rainey's self-serving but unqualified opinion was not offered to explain the mental state of the pilots or the final flight maneuver of the aircraft. It was clearly his unqualified opinion as to the ultimate cause of the accident. The Eleventh Circuit, in an effort to correct what it misconceived to be "inherently unfair" evidence, circumvented the requirements of Rule 106 by using what it termed the "*concerns*" of the rule. The court not only overlooked the fact that no part of the letter was ever offered or admitted into evidence, but also disregarded the fact that the opinion evidence was improper, irrelevant and not explanatory of the questions asked on direct. The completeness doctrine is not only inapplicable but certainly cannot be utilized for the purpose of requiring introduction of an inadmissible statement that is neither explanatory of non relevant to the admitted portions. *United States v. Marin*, 669 F.2d 73, 84 (2d Cir. 1986).

It is also fundamental that a party must positively invoke Rule 106 in a timely fashion or it is waived. *Hill v. Nelson*, 676 F.2d 1371 (11th Cir. 1982); *United States v. Winkle*, 587 F.2d 705 (5th Cir. 1979), *cert. denied*, 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979). The first time reference to Rule 106 appears in this case is in the original panel opinion. *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1529 (11th Cir. 1986). It was never raised by Rainey at trial, never argued to the trial judge on the Motion for New Trial, and never included in briefs submitted to the Eleventh Circuit on appeal.

In *United States v. Larranga*, 787 F.2d 489, 500 (10th Cir. 1986), the court refused a party's request to introduce an entire document on redirect. The opponent had used a portion of a document during cross-examination, and the party had failed to invoke Rule 106 at that time. In concluding Rule 106 had been waived, the court said:

> On appeal, the defendant argues that the transcript was admissible under Federal Rule of Evidence 106. This rule provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Fed.R.Evid. 106. Defendant did not follow the procedure outlined in Rule 106 "*at that time*" when the question and answers were introduced. Thus defendant's reliance on Rule 106 is misplaced. (emphasis added)

The time to invoke Rule 106 is when any portion of a document is first introduced. Rainey and Knowlton not only waived the application of the Rule at trial, but

never even raised it on appeal. The *sua sponte* application of the Rule by the Eleventh Circuit as set forth in footnote 11 (J.A. 130) is simply too late and cannot be used to justify the admission of otherwise inadmissible opinion testimony.

If Rule 106 is not invoked in a timely fashion, the evidence sought to be admitted may be admitted at a later time if the evidence is otherwise admissible on its own merits. Wright & Graham explain the reasoning behind this aspect of Rule 106:

> The failure to make a timely request for completeness may prevent the party from predicating error or the failure to enforce Rule 106; it does not, however, bar the party from introducing the explanatory material himself, *assuming that the material is admissible at his behest*. (emphasis added)

C. Wright & K. Graham, *Federal Practice and Procedure* §5076 (1978). Rainey's counsel did not attempt to invoke Fed.R.Evid. 106 during the direct examination. Rainey had the burden to demonstrate that the evidence was admissible on its own, independent of Rule 106. The trial judge correctly concluded that the disputed question sought an expert opinion from an unqualified lay witness and sustained the objection. There was no attempt whatever by Rainey's counsel to follow through at any time during the remainder of the trial to qualify LCDR Rainey as an expert and then offer or admit this evidence or to otherwise protect the record. Trial counsel has the affirmative burden of objecting in a timely fashion and to make every reasonable effort in conducting his case to fairly and completely present evidence and objections so that the trial

judge may make a fully informed ruling. He cannot now, for the first time on appeal, benefit from his total failure to act.

Rule 801

Denuded of the misconception that the two instances of pilot error referred to in Rainey's letter were published to the jury, there is no basis for finding Rainey's unqualified opinion was relevant or admissible and that its exclusion was reversible error. The Eleventh Circuit panel incorrectly concluded that the district judge had permitted Beech's inquiry into the damaging statements in Rainey's letter to JAG investigator Morgan that his wife's aircraft "violated pattern integrity . . . as it turned crosswind without proper interval." Concluding that these damaging statements of pilot error were submitted to the jury, the Eleventh Circuit interpreted these as prior inconsistent statements made by Rainey. *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1529-30, footnote 12 (11th Cir. 1986). Fed.R.Evid. 801(d)(1)(A) relates to prior inconsistent statements and provides:

> (d) Statements which are not hearsay. A statement is not hearsay if–
>
> > (1) Prior statements by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition,. . . .

Rainey and Knowlton successfully contended that Rainey's unqualified opinion as to the cause of the crash was admissible as a prior *consistent* statement to offset the damaging effect of Rainey's statements in paragraph four of the letter. Unknown to the Eleventh Circuit this evidence was *not* submitted to the jury. Fed.R.Evid. 801(d)(1)(B), admissibility of prior consistent statements, in material part, states that:

> (d) Statements which are not hearsay. A statement is not hearsay if–
>
> > (1) Prior statements by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony, and is offered to rebut an express or implied charge against the declarant of recent fabrication of improper influence or motive. . . .

Nothing in the testimony presented to the jury justified a "charge against the declarant of a recent fabrication or improper influence or motive." In fact, Rainey's testimony on direct was entirely consistent with his previous statements made before the jury from the letter. Rule 801(d)(1)(B) only permits the use of prior consistent statements to rehabilitate a witness who has been impeached. *United States v. Weil*, 561 F.2d 1109 (4th Cir. 1977). As Weinstein cautions:

> Rule 801(d)(1)(B) should apply only when there is some suggestion . . . that the witness consciously altered his testimony after making the inconsistent statement by which he has been impeached.

Since Rainey had not been charged with a recent fabrication or change from the facts set forth in the portion of letter disclosed to the jury, there was no basis or predicate for the admission of his opinion as to probable cause of the accident as a prior inconsistent statement. To hold otherwise would approve the unrestricted use of a prior self-serving consistent statement to bolster a party's general theory of the case. The Eleventh Circuit misapplied Rule 801(d)(1)(B), and its conclusion is in error.

If Rainey's counsel felt materially aggrieved by the district court's rejection of his unqualified opinion testimony that engine rollback was the probable cause of the accident, the rules provide ample remedies for any perceived error:

1. He should have attempted, after the trial judge sustained the objection or on rebuttal, to qualify Rainey as an expert and then asked his opinion. He did not do so.

2. He should have invoked Rule 106 in a timely fashion as required by its provisions. He did not do so.

3. He should have offered or proffered pertinent parts of the letter into evidence to protect the record. He did not do so.

4. He should have brought the provisions of Rule 801 to the attention of the trial judge. He did not do so.

Trial counsel has a fundamental responsibility to make timely, accurate and complete objections in order to give the trial judge an opportunity to make a fair and fully informed ruling. This is a basic canon of trial

conduct. Where counsel fails to do this and seeks relief on appeal, he must advance justification for his failure to do so or protections afforded by the rules are waived. No such justification has been shown.

As the Eleventh Circuit's interpretation of Rule 106 now stands, the opinion unintentionally creates a tactical vehicle for circumvention of the Federal Rules of Evidence by enterprising trial attorneys to admit evidence that is otherwise inadmissible. The scope of misuse of Rule 106 is limited only by the imagination of this nation's trial attorneys. The Eleventh Circuit's published interpretation of Rule 106 constitutes a clear departure from the accepted and usual course of judicial proceedings and must be reversed.

CONCLUSION

The decisions of the Eleventh Circuit Court of Appeals should be reversed and the cause remanded to the district court for reinstatement of the final judgments for defendants.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1987

BEECH AIRCRAFT CORPORATION
AND BEECH AEROSPACE SERVICES, INC.,

Petitioners,

vs.

JOHN C. RAINEY,

Respondent.

BEECH AIRCRAFT CORPORATION
AND BEECH AEROSPACE SERVICES, INC.,

Petitioners,

vs.

RONDI M. KNOWLTON,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For the Eleventh Circuit

REPLY BRIEF OF PETITIONER BEECH AIRCRAFT CORPORATION (CASE NO. 87-981)

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INTRODUCTION

Respondents ask the Court to adopt a restrictive interpretation of Rule 803(8)(C) which would withhold trustworthy, probative and potentially unique evidence from consideration by the finder of fact. Petitioner Beech respectfully submits that such a construction would create an unwarranted obstacle in the ultimate search for truth, contrary to the stated purpose and intent of the Federal Rules of Evidence.[1]

I.

THE TRUSTWORTHINESS OF THE JAG REPORT HAS ALREADY BEEN CONCLUSIVELY DETERMINED.

The first issue presented for the Court's consideration is whether evaluative findings in trustworthy public reports are admissible pursuant to Fed.R.Evid. 803(8)(C). By arguing that LCDR Morgan's findings were unreliable or that they were surprised by the admission of his report, Respondents detract from the issue presented.

The trustworthiness of a report of an investigation conducted pursuant to law should be the central focus of inquiry under Rule 803(8)(C). *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 618 (8th Cir. 1983). (" . . . once a report is conclusively shown to represent findings of a public agency made pursuant to an investigation authorized by law, the central inquiry becomes

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[1] All parties to the proceeding below have been listed at Page ii of Petitioner's Initial Brief.

whether the report is trustworthy"). The burden is on the party seeking to exclude a public report to demonstrate that its findings are unreliable. *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984).

In the present case, the Respondents knew from the earliest stage of this litigation of the existence of Morgan's report and the substance of its findings. Notwithstanding this knowledge, Respondents made no effort to depose Morgan, attack his findings or discredit the methodology which he employed. Thus, the trial court, the panel and the *en banc* court concluded that LCDR Morgan's report was trustworthy for purposes of Rule 803(8)(C). *See Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1527 (11th Cir. 1986) (" . . . because no evidence was introduced to show that the report lacked trustworthiness, we find that the report was indeed trustworthy.") (J.A.35, 119-133)

For Respondents to argue now in this Court that Morgan was unqualified to conduct the investigation or that his report was otherwise unreliable is improper. The time to have challenged this report was during the extensive discovery period, at pretrial and/or at trial.[2] Having failed to do so, Respondents cannot now attack either Morgan or his findings. These matters are simply no longer at issue.

---

[2] The trial court granted Respondents' request to call previously unlisted witnesses to challenge the findings in the Jag Report. (J.A.42) Notwithstanding this permission, Respondents called no witnesses for this purpose.

Likewise, Respondents' contention that they were surprised by the admission of the Jag report is unfounded. All parties were aware throughout this litigation that the Defendants would seek to admit the *entire* Jag report into evidence. To this end the Defendants continued throughout the pretrial period to tender argument and legal memoranda to the trial court in support of broad admissibility. (R. 1293-1304, 1328-1331, 1440)

Once a decision was reached to admit the evaluative findings in the report, the Respondents did not seek a continuance, and they declined the Court's invitation to present evidence on this issue. Therefore, their present contentions regarding surprise are not supported by the record. *See Rainey v. Beech Aircraft*, 784 F.2d at 1527 ("Rainey and Knowlton knew months before trial that the defendants would seek to admit Lieutenant Morgan's report into evidence. Still, Rainey and Knowlton made no effort to attack the qualifications of Lieutenant Commander Morgan or the methodology he employed in conducting his investigation.")

The Morgan Jag report is a trustworthy record of an investigation conducted pursuant to law, and its purpose was well known to the Respondents. The issue to be determined by this court is whether 803(8)(C) contemplates admission of the report's evaluative findings. To raise questions now concerning Morgan's qualifications and the Respondents' alleged surprise improperly detracts from the issue presented.

II.

ALTHOUGH THE LEGISLATIVE HISTORY OF RULE 803(8)(C) IS EQUIVOCAL, THE INTERPRETATION ADOPTED BY THE SENATE, THE ADVISORY COMMITTEE AND THE MAJORITY OF CIRCUITS REPRESENTS THE PREFERRED VIEW.

The Senate and House developed opposing views on the appropriate interpretation of Rule 803(8)(C). The House advocated a narrow construction of the rule, with the Senate adopting the Advisory Committee's position in favor of broad admissibility. *See* Report of the Committee on the Judiciary H.R. Rep. No. 93-650, 93rd Cong., 1st Sess. 14 (1973). Report of the Committee on the Judiciary S. Rep. No. 93-1277, 93rd Cong., 2d Sess. 18 (1974). This conflict was never resolved, as the Congressional Conference Committee made no reference to the appropriate scope of Rule 803(8)(C). *See* Notes of Conference Committee H.R. Conf. Rep. No. 1597, 93rd Cong., 2d Sess. (1973).

Although the legislative history is, at best, equivocal, Respondents urge that the House view should be followed because the Senate failed to amend the text of Rule 803(8)(C) as approved by the House. This reasoning, however, provides no basis for such a construction of the Rule. The House itself made no change in the language of Rule 803(8)(C). Therefore, Respondents' argument, taken to its logical extreme, would seem to favor the broad interpretation advocated by the advisory committee, as neither the House nor Senate amended the Rule as drafted.

Logic would favor the Senate construction of the Rule because it is in agreement with the advisory committee, and the Senate was the last legislative body to consider the issue. If the House intended to continue its challenge to the interpretation adopted by the Senate and Advisory Committee, then one would expect specific mention of the point in the report of the Conference Committee. *See* Notes of Conference Committee H.R. Conf. Rep. No. 1597, 93rd Cong., 2d Sess. (1973). The report, however, is silent on the issue.

In commenting on the House's narrow construction of this Rule, Judge Weinstein has noted:

> . . . the Senate Committee on the Judiciary strongly disagreed with this narrow view. Since no reference to the differing approaches was made in the Conference Report, no inference should be drawn that the Senate's liberal interpretation was withdrawn. A broader conception of the phrase "factual findings" is consonant with the Advisory Committee's Note, which accepted "evaluative reports" as being within the scope of Rule 803(C), and with the general thrust of the Federal Rules of Evidence. (citations omitted, emphasis in the original)

See 4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 803(8)[03] (1985). *See also* M. Graham, *Handbook of Federal Evidence* § 803.8 (1980) ("The report of the Senate Committee advances the preferred position"). The interpretation advanced by the Senate, in favor of broad admissibility, has also been adopted by the overwhelming majority of courts which have addressed this issue. *See generally, United States v. American Telephone & Telegraph Co.*, 498 F. Supp. 353, 359 (D. D.C. 1980) ("Extrinsic materials indicate that the Rule is

most appropriately considered by following the Senate Committee's position.")

Thus, contrary to Respondents' contentions, the conflicting legislative history of this Rule does not favor the narrow interpretation advanced by the House. If anything, the available history indicates that the Senate position is correct, as it came later in time and is in full agreement with the interpretation advanced by those who drafted the Rule.

Respondents also contend that a restrictive interpretation is supported by the plain language of the Rule. This assertion, however, does not withstand scrutiny. As urged in our initial brief, the phrase "factual findings" is literally defined as, "[a] conclusion by way of reasonable inference from the evidence." Black's Law Dictionary 569 (5th ed. 1979). *See also Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498 (11th Cir. 1987) (. . . "a 'finding of fact' refers to the result or conclusion drawn by an investigator, whether it be a fire inspector, judge, or jury, 'from facts without exercise of legal judgment.' ") 827 F.2d at 1510. Thus, a literal reading of the Rule fully supports the Senate's position in favor of broad admissibility. This interpretation of the phrase "factual findings" is also supported by the advisory committee, which clearly intended the Rule to have a broad construction. *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S. Ct. 2054, 60 L.Ed.2d 661 (1979). ("The advisory committee notes, however, accept evaluative reports as being within the meaning of factual findings under Rule 803(8)(C).") If the advisory committee believed that the phrase "factual findings" did not encompass

evaluative conclusions, it clearly would have amended the language to include these findings. Petitioner believes that the advisory committee correctly concluded that the phrase "factual findings," fairly read, is broad enough to include evaluative conclusions derived from an examination of the underlying facts.

Thus, if this Court applies the Rule according to its facial terms, the findings contained in the Jag report would be properly admissible as evidence.

Respondents also attempt to support a narrow construction of the Rule by noting that Rule 803(6) contains the words opinions and diagnoses. Respondents hypothesize that if evaluative findings were intended to be admissible under 803(8)(C), then language similar to that adopted in 803(6) would have been used in the Rule. This argument, however, ignores the fact that the drafters of Rule 803(8)(C) expressly provided that evaluative findings should be admissible in the first instance. *See* Fed.R.Evid. 803(8)(C) advisory committee note. In view of this statement of intent by the advisory committee, a comparison of different evidentiary principles, which are designed to apply to totally separate instances, provides no support for the narrow interpretation now urged by the Respondents.

Additionally, as suggested by Judge Tjoflat in his special concurrence in the *en banc* opinion, the only reason the words opinions and diagnoses appear in 803(6) was because prior model evidence rules had contained ambiguous language concerning the admissibility of such findings under the regular entries rule. *See Rainey v. Beech Aircraft*, 827 F.2d 1498, 1511, 1512 (11th Cir. 1987). Prior to enactment of the current Federal Rules of Evidence, opinions and diagnoses were

not normally encountered in traditional business records. Now, however, such findings commonly appear in medical records, and the advisory committee wanted to make abundantly clear its adherence to the trend favoring admission of such findings under the regular entries rule. *Id.* at 1512. Given this explanation for the appearance of the words opinions and diagnoses in 803(6), Judge Tjoflat correctly concluded that such language offers no support for a narrow interpretation of 803(8)(C). ("Given this account of why the regular entries rule makes explicit reference to diagnoses and opinions, it strikes me as absurd to cite the language of that rule [803(6)] as support for an argument limiting the scope of factual findings.") In fact, as noted in Judge Weinstein's treatise, a narrow construction of 803(8)(C) would be *inconsistent* with 803(6).

> . . . any attempt to ascribe a severely restricted significance to the phrase 'factual findings' in all cases would be inconsistent with Rule 803(6), . . . No legislative history points to any intent on the part of Congress to limit the public records exception so as to exclude records which had previously qualified for admission pursuant to the business entries exception.

4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 803(8)[03] (1985)[3] As these authorities indicate, the language in Rule 803(6) does not support a restrictive interpretation of 803(8)(C).

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[3] Neither the Senate, House nor Conference Committee notes to Rule 803(8)(C) discussed the use of the terms opinions or diagnoses in 803(6), or how these words may differ in scope from the phrase "factual findings." *See Rainey*, 827 F.2d at 1512.

III.

SMITH V. ITHACA IS AN ANOMALY AMONG THE CIRCUITS AND IS IN CONFLICT WITH SEVERAL DECISIONS OF THE FIFTH CIRCUIT.

Notwithstanding the Respondents' contentions to the contrary, Beech respectfully says that Judges Tjoflat and Johnson correctly characterized the holding in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), as an "anomaly among the circuits." *Rainey v. Beech Aircraft Corporation*, 827 F.2d 1498, 1515 (11th Cir. 1987) (Tjoflat, J., concurring specially.) *Rainey v. Beech Aircraft*, 784 F.2d 1523, 1530 (11th Cir. 1986) (Johnson, J., concurring specially). Even accepting the argument advanced in Respondents' brief, it is apparent that of the ten circuits to address this issue, eight have squarely held that broad admissibility under 803(8)(C) is the preferred approach.[4] Beech respectfully suggests that this balance of authority qualifies *Smith v. Ithaca* as an anomaly among the circuits, particularly since the Fifth Circuit has failed to follow *Ithaca* on several occasions.

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[4] Respondents' contention that the Second Circuit follows the Fifth Circuit's narrow interpretation of Rule 803(8)(C) is not well founded. One of the strongest statements in favor of broad admissibility under 803(8)(C) is found in *Litton Systems, Inc. v. American Telephone and Telegraph Co.*, 700 F.2d 785, 818 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984). In that case the court upheld the admission of

(Continued on following page)

Decisions of the Fifth Circuit prior to *Smith v. Ithaca* approved the admission of evaluative conclusions contained in government reports. *See McCarty v. United States*, 185 F.2d 520 (5th Cir. 1950) (admitting as evidence certificate of settlement by GAO showing amount of defendant's indebtedness to the government), *see also, Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975). Interestingly, the *McCarty* decision is cited in the advisory committee note to 803(8)(C) in support of broad admissibility of evaluative findings. For some unarticulated reason the Fifth Circuit *Ithaca* panel chose not to follow the *McCarty* precedent.

Fifth Circuit decisions after *Ithaca* have also approved the admission of evaluative reports pursuant to 803(8)(C). *See Mac Towing, Inc. v. American Commercial Lines*, 670 F.2d 543, 547 (5th Cir. 1982); *Local Union No. 59, International Brotherhood of Electrical*

(Continued from previous page)

FCC decisions that characterized AT&T tariffs as "unjust and unreasonable discrimination" and "unnecessarily restrictive." The court reasoned that these evaluative conclusions constituted "factual findings" within the meaning of rule 803(8)(C). In its most recent consideration of the issue, the Second Circuit adhered to *Litton*, holding that conclusions in FBI reports regarding the genuineness of a signature were admissible pursuant to Rule 803(8)(C). *See Bradford Trust Company of Boston v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 805 F.2d 49 (2d Cir. 1986). Thus, for Respondents to urge that the Second Circuit follows the Fifth Circuit's construction of Rule 803(8)(C) is, we believe, an incorrect statement of existing Second Circuit law.

Workers v. Namco Electric, Inc., 653 F.2d 143 (5th Cir. 1981); *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). In each of these subsequent decisions the court did not feel compelled by *Ithaca* to exclude evaluative government reports.

In sum, Fifth Circuit decisions both before and after *Ithaca* have admitted evaluative conclusions contained in government reports. The court in *Ithaca* ignored its own existing precedent and relied entirely upon a district court decision to support exclusion of the evaluative portions of a Coast Guard report. *See Complaint of American Export Lines, Inc.*, 73 F.R.D. 454 (S.D.N.Y. 1977). This district court opinion, however, is not followed even in the circuit from which it emanates, and it provides a wholly insufficient reason for deviating from existing Fifth Circuit precedent. *See Bradford Trust Company of Boston*, 805 F.2d 49 (2d Cir. 1986).

Although recent cases in the Fifth Circuit have adhered to *Ithaca*, that court last year expressed some reluctance in doing so. In *McQuaig v. McCoy*, 806 F.2d 1298 (5th Cir. 1987), the court noted that it was compelled to follow *Ithaca* until overruled by the Fifth Circuit *en banc* or by the United States Supreme Court. *See McQuaig*, 806 F.2d at 1302. Similarly, in its original opinion in *Rainey*, the Eleventh Circuit noted that it was not free to adopt the prevailing interpretation of Rule 803(8)(C), as it was constrained to follow

existing Fifth Circuit precedent on this issue. *Rainey v. Beech Aircraft Corporation*, 784 F.2d at 1528.[5]

The overwhelming majority of courts support broad admissibility of evaluative findings pursuant to Fed.R.Evid. 803(8)(C). The Fifth Circuit's isolated decision to the contrary is inconsistent with its own precedent on this issue and provides little by way of legal analysis to support a restrictive interpretation of this Rule.[6]

IV.

THE DISPUTED FINDING IN THE JAG REPORT WAS AN EVALUATIVE CONCLUSION DERIVED FROM AN EXAMINATION OF THE FACTS WITHOUT EXERCISE OF LEGAL JUDGMENT.

Respondents' objection to the Morgan Jag report can be traced to the admission into evidence of the following single finding:

> The most probable cause of the accident was the pilot's failure to maintain proper interval.

(J.A.15) This evaluation was based on an express factual determination also present in the same report:

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions issued prior to September 1981.

[6] In *Ithaca* the Fifth Circuit relied upon a comparison of 803(6) and 803(8)(C) to support a narrow construction of the phrase "factual findings." As was previously noted, however, a comparison of these two rules does not support a narrow interpretation of 803(8)(C).

> At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned.

(*See* finding #13 J.A.10) As these excerpts indicate, Morgan's evaluative conclusion was simply an inference drawn from a specific finding which appeared of record in his report. This evaluative finding, however, did not reach a legal conclusion, make a finding of negligence or otherwise attempt to attribute ultimate fault. Fairly read, this finding simply speaks in terms of probabilities with regard to the potential causes of an accident. Such a finding is not the equivalent of a determination of legal liability. Instead, it amounts to nothing more than an evaluation of existing facts without exercise of legal judgment. *Rainey,* 827 F.2d at 1510. Admission of such findings can only serve to aid the jury in its search for truth and is of the type which has been admitted routinely by the circuit courts.[7] *See Rainey*, 827 F.2d at 1510.

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[7] The admission of the unbiased Jag findings was particularly important because the death of the pilots and the total destruction of their aircraft placed a premium on expert evidence. *See Rainey,* 827 F.2d at 1507. Commander Morgan was the only impartial individual to investigate this matter at or near the time of the accident. To shield his trustworthy findings from the jury would impede the search for truth. Respondents contend that the parties should be required to produce their own experts to prove their case, without reliance upon impartial governmental findings. Professor McCormick, however, believed that it was this very impartiality and freedom from taint which required admission of such trustworthy findings. McCormick – Can The Courts Make Wider Use Of Reports Of Official Investigations? 42 Iowa L.Rev. 363, 364-365 (1957).

Respondents' invitation to limit the scope of Rule 803(8)(C) to purely factual matters, aside from being contrary to the Rule's stated purpose, would lead to confusion, increased litigation and frustrate the ultimate search for truth. As Petitioners urged in their initial briefs, a clear-cut distinction between fact and opinion is impossible to draw. 4 J. Weinstein and M. Berger, *Weinstein's Evidence* § 803(8)[03] (1985). This difficulty arises from the reality that all findings, no matter how factual, are to one degree or another evaluative because they involve the perception, training and experience of the individual collecting the data. See Oliphant, *Facts, Opinions, and Value – Judgments*, 10 Tex.L. Rev. 127, 133 (1932). Even pure fact finding is a filtering process by which an individual reports his inferences from the stimuli presented, thus rendering the findings evaluative in nature. This is particularly true when an investigator is reporting matters which have been related by third parties. To determine when such findings cease being factual and become evaluative is an impossible task. Oliphant, *Facts, Opinions, and Value – Judgments*, 10 Tex.L.Rev. at 133. (. . . "The point at which what we now call facts shades off into what we now call opinions [can] not be detected.") It is unfair to suggest that trial judges should have the responsibility of making these hairsplitting distinctions, or that the admissibility of potentially critical evidence should depend upon a determination of these rather amorphous concepts. More appropriately, the court should direct its attention toward a determination of whether the report at issue contains sufficient indicia of trustworthiness. If it does, and it contains a

finding which is helpful to the jury, it should be admitted for consideration by the finder of fact. *See Rainey*, 827 F.2d at 1512. This will facilitate the ultimate search for truth and prevent the creation of a new series of appeals which seek to challenge the court's fact/opinion determination.

Respondents also urge that if a broad construction of Rule 803(8)(C) should be adopted by the Court, that admission be limited to normative conclusions, that is, findings which conform to an authoritative standard. Such a construction, however, would be contrary to the purpose of 803(8)(C) and would convert the rule into one of exclusion, rather than one of inclusion. *See* Fed.R.Evid. 803(8)(C) advisory committee note (the Rule presently assumes admissibility in the first instance). Additionally, drawing a distinction between normative conclusions and other evaluative findings is not supported by the Rule or the case law construing it. In fact, although Respondents rely upon *Weinstein's Evidence* Treatise and *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F. Supp. 1125 (E.D. Pa. 1980), *aff'd in relevant part, rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), to support their narrow interpretation of Rule 803(8)(C), neither of these authorities stands for the proposition that admissibility should be limited to normative findings. Both of these authorities, in fact, advocate a broad construction of the phrase "factual findings" as contained in Rule 803(8)(C). *See Zenith*, 505 F. Supp. at 1144 (" . . . we think the term is broad enough to encompass any statement of fact that represents a conclusion on the part of

an investigator. . . ."). *See also* 4 J. Weinstein & M. Berger *Weinstein's Evidence* § 803(8)[03] (1985) ("If the report states a conclusion that would be helpful – and is reliable – it should be admitted"). Further, the notion of limiting admissibility under 803(8)(C) to normative conclusions finds no support among the decisions of the circuit courts.

It is respectfully submitted that drawing a distinction between normative conclusions and other evaluative findings would require trial judges to grapple with unworkable distinctions and result in the unnecessary exclusion of trustworthy probative evidence.

Respondents' reliance upon the definitions contained in the manual of the Judge Advocate General is also misplaced. Respondents contend that since the Jag manual separately defines findings of fact and opinions this Court should adhere to these designations and exclude Morgan's evaluative findings. This contention, however, is in error, as the scope of the phrase "factual findings" contained in 803(8)(C) cannot be modified, restricted or otherwise defined by definitions contained in a military manual. Additionally, the definitions contained in this manual actually support a broad interpretation of the Rule. The Jag manual defines opinions as:

> Logical inferences or conclusions which flow from the facts.

Manual of the Judge Advocate General 0608(d). Interestingly, this definition closely parallels the definition of finding of fact contained in Black's Law Dictionary. It provides that a finding of fact is:

> [A] conclusion by way of reasonable inference from the evidence.

Black's Law Dictionary 569 (5th ed. 1979). As is apparent, the Jag manual's definition of opinion is almost identical to the legal definition accorded factual findings. As a result, the scope of Rule 803(8)(C) is clearly broad enough to include the Jag report findings which the military characterizes as opinions.

V.

INTRODUCTION OF PARTS OF A TRUSTWORTHY GOVERNMENTAL REPORT DID NOT CAUSE THE JURY TO ABDICATE ITS RESPONSIBILITY.

Respondents' final contention is that admission of the findings in the Jag report invaded the province of the jury. This conclusion, however, fails to give appropriate deference to the capabilities of the jury system, which has long been considered able to accord appropriate weight to particular pieces of evidence.

The Jag report excerpts were received like any other piece of evidence, with all parties remaining free to comment upon it or attack or support its findings. The jury was free to give the excerpts from this report whatever weight, if any, it felt warranted. *See Bradford Trust Company*, 805 F.2d at 54 ("The weight and credibility extended to government reports admitted as exceptions to the hearsay rule are to be determined by the trier of fact"). Such functions are clearly within the capabilities of a jury under our system, and it is incorrect to assert that the admission of a single report in

the midst of this complex trial would cause the jury to abdicate its responsibility.

VI.

FEDERAL RULES OF EVIDENCE 106 AND 801(d)(1)(B) WERE IMPROPERLY APPLIED TO OVERTURN A JURY VERDICT REACHED AFTER TWO WEEKS OF TRIAL.

In their brief, Respondents offer nothing to alter the fact that Fed.R.Evid. 106 was never invoked during the testimony of LCDR Rainey. In fact, a review of the entire record reveals that this Rule of Evidence was never mentioned by Respondents throughout this entire proceeding, either at trial or on appeal. The trial judge had no way of discerning that Respondents sought to admit Rainey's hearsay opinion on proximate cause solely to place his early statements in context. Had counsel for Respondents articulated this for the court, its ruling may well have been different. In the context presented, however, the court's ruling excluding this opinion was eminently correct.

Finally, Petitioner Beech believes that a fair review of Rainey's trial testimony will show that Fed.R.Evid. 801(d)(1)(B) is totally inapplicable in this instance. Rainey had not been charged with a recent fabrication, and his testimony on direct was entirely consistent with his earlier statements. Such a scenario offers no predicate for the admission of Rainey's hearsay opinion under the guise of a prior consistent statement. Additionally, the jury was well aware of Rainey's theory of the case, as his position had been ably expressed through counsel and expert witnesses. To reverse a two-week jury trial simply because Rainey was prevented from articulating a hearsay opinion consistent with his

general theory of the case would be unwarranted. *See* Fed.R.Evid. 103(a).

CONCLUSION

For the reasons submitted, Petitioner Beech respectfully asks this Court to reverse the Court of Appeals and order reinstatement of the judgments of the Trial Court.

Respectfully submitted,

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Nos. 87-981, 87-1028, 87-1146
Consolidated

In The
Supreme Court of the United States
October Term, 1987

—o—

BEECH AIRCRAFT CORPORATION AND
BEECH AEROSPACE SERVICES, INC.,
Petitioners,

vs.

JOHN C. RAINEY,
Respondent,

BEECH AIRCRAFT CORPORATION AND
BEECH AEROSPACE SERVICES, INC.,
Petitioners,

vs.

RONDI M. KNOWLTON,
Respondent.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

REPLY BRIEF OF PETITIONER, BEECH AEROSPACE SERVICES, INC.

—o—

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ADDITIONAL FEDERAL RULES OF EVIDENCE INVOLVED

4. Federal Evidence Rule 103 10

Rulings on Evidence

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

• • •

(2) Offer of proof.—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

• • •

(c) Hearing of jury.—In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

I

ADMISSIBILITY OF THE JAG REPORT
A—SURPRISE

Respondents ("Rainey" or "plaintiffs") claim that the trial judge's ruling on July 10, 1984, that opinions contained in the JAG Report would be admissible came as a surprise on the eve of trial. This was a primary issue which was consistently contested. Rainey was, or should have been, prepared to attack trustworthiness, but didn't. They were tactically content to claim "surprise" and completely avoid the issue of trustworthiness. Please consider the following:

1. Rainey's pre-trial memo submitted four months before trial declared their readiness to attack the trustworthiness of the JAG Report. Referring to LCDR Morgan's qualifications, at page 16 (R. Vol. 4, 207) they confidently state:

> While there is yet no evidence in the record to this effect, (trustworthiness) plaintiff is prepared at trial to introduce evidence that the person who conducted the JAG investigation was not a trained or experienced aircraft mishap investigator, or trained to investigate the highly complex nature of an air crash.

Despite this announcement:

(a) No effort was made to depose LCDR Morgan at any time.

(b) He was never listed as a witness.

(c) Defendants moved for a summary judgment involving the JAG Report and had a hearing on June 6, 1984, five weeks prior to the trial date. (R. Vol. 3, 183; Vol. 4, 211; Vol. 5, 228)

(d) Thereafter briefs were filed urging the trial judge to admit the opinions in the JAG Report. (R. Vol. 5, 266)

(e) Plaintiffs even filed and briefed a Motion in Limine to exclude the entire JAG Report on June 15, 1984, four weeks before trial. (R. Vol. 5, 268-269)

2. Opinions in the JAG Report were declared admissible by the trial judge on the eve of trial, July 10, 1984. Rainey promptly moved for permission to call additional witnesses at trial to impeach the trustworthiness of LCDR Morgan and the JAG Report, and submit additional instructions. This motion was granted. They did not:

(a) Add or call additional witnesses.

(b) *Move for a continuance.* Fed.R.Evid. 403.

(c) Ask for an opportunity to depose LCDR Morgan.

(d) Ask for a break in the trial or before commencement of trial to depose LCDR Morgan.

(e) Subpoena LCDR Morgan or report to the court they tried but couldn't locate him.

(f) In good faith, pursue any other avenue of relief.

3. It is respectfully submitted that Rainey either couldn't impeach LCDR Morgan's credibility or the trustworthiness of the JAG Report—or elected to tactically "stonewall" it and utilize "surprise" as a ground for appeal. Plaintiffs had two weeks during trial to utilize their experts to impeach the trustworthiness of the JAG Report or LCDR Morgan's experience or attempt to call LCDR Morgan, if they were ready and able to discredit Morgan's qualifications as announced in their pre-trial memo four months earlier.

4. Another puzzling event occurred during trial on July 16th. Rainey called Mr. Hall, their expert on engines and other matters. On cross-examination by Mr. Womack (Beech's counsel) he opened the door for Mr. Hall to give

his views on the JAG Report. Hall had previously testified he had read the JAG Report, reviewed photographs and other records. (T-4, pp. 153, 154). The following occurred (T-4, p. 170):

> Q. Now, you read the JAG Report in this case, I think you said.
>
> A. Not all of it. I read a portion of it.
>
> Q. Well, did you read the findings, the factual findings and conclusions of the report?
>
> A. I believe I read the findings and conclusions.
>
> Q. What was your view of that?
>
> Mr. Partington (Plaintiffs' counsel): Your Honor, this is completely beyond the scope and improper.
>
> The Court: This is the second time you've gone into this Mr. Womack. The objection is again sustained.

It is difficult to conceive of a more dramatic and opportune time for Plaintiffs, through their allegedly highly qualified experts, and at defendants' invitation, to scuttle the JAG Report, illuminate LCDR Morgan's alleged lack of qualifications and destroy the content of the JAG Report. This was not done apparently because:

(a) Plaintiffs could not effectively demonstrate untrustworthiness.

(b) They wanted to save their assault until rebuttal if and after the JAG Report was admitted, which they didn't.

(c) Rainey tactically wanted to preserve their position that the trial judge's change in ruling six days earlier constituted surprise and error.

Certainly, it came as no surprise to plaintiffs that defendants would press for the admission of all relevant parts of the JAG Report opinions into evidence. It often occurs that, because of developments during trial, evidence considered inadmissible prior to trial may become admissible as the trial develops. Trial counsel has a duty to anticipate and be prepared for such a development.

Counsel must be alert for developments during trial that may result in admission or exclusion of evidence contrary to the judge's pre-trial ruling. This Court should not condone a deliberate election on the part of plaintiffs not to depose Morgan, call and impeach him at trial, or fail to challenge the JAG Report. Further, to allow plaintiffs to take this position and, if dissatisfied with the verdict, seek a new trial on appeal, clearly would be an unacceptable result. It would encourage a flood of appeals and the award of new trials would become the rule rather than the exception.

It is also inappropriate to claim surprise for the first time on appeal. *Boston v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 805 F.2d 49 (2d Cir. 1986). Fed. R.Evid. 403 advisory committee note provides: "[T]his rule does not enumerate surprise as a ground for exclusion (of evidence)." *See also O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1549 (11th Cir. 1984) *"The remedy for coping with surprise is not to seek reversal after an unfavorable verdict, but a request for continuance at the time the surprise occurs."*

B—INABILITY TO CROSS-EXAMINE THE AUTHOR OF THE OPINION

Rainey and Knowlton complain of the unfair burden placed upon them by allowing public reports and records to be submitted to the jury. They do so in the face of their inexplicable failure to interview, depose, list or call LCDR Morgan as a witness and their failure to allow one of their experts (Hall) to criticize the JAG Report and LCDR Morgan at trial.

These criticisms go to the very existence of Fed.R. Evid. 803(8)(C). The presumption of trustworthiness, compounded by plaintiffs' failure to depose LCDR Morgan or pursue the many other preparatory and protective remedies available are inexcusable. Any matter complained of was either invited or induced by plaintiffs.

C—NORMATIVE JUDGMENTS

Plaintiffs quote Weinstein in the hope of distinguishing "normative conclusions" from opinions. They cite *Zenith Radio Corporation v. Matsushita Electric Industries Co., Ltd.*, 505 F.Supp. 1125 (E.D. Pa. 1980) and Weinstein's comments thereon as follows:

> The treatise advocates that "[i]f the report states a conclusion that would be helpful—and is reliable—it should be admitted." Vol. 4, p. 803-251. *Weinstein* also quotes with approval the opinion of a District Judge who, after an extensive review of the Rule 803(8)(C) cases, stated it is now generally accepted that "evaluative reports of public agencies (i.e., those rendering normative judgments *or opin-*

ions, not just reciting facts) are admissible." (Resp. Br. p. 28) (emphasis added).

They argue that Weinstein distinguishes normative judgments from opinions. In doing so they misread what is written. Weinstein clearly says: "it is now generally accepted that 'evaluative reports of public agencies' (i.e., those rendering normative judgments *or opinions,* not just reciting facts) are admissible." (emphasis added).

BASI can't help but wonder what the impact would be on Dean McCormick, who observed that the fact/opinion differentiation has "proved to be the clumsiest of all tools furnished the judge. . . ." McCormick, *Evidence,* § 11 at 27 (3d ed. 1984). We would respectfully submit that by adding Rainey's interpretation to the formula, Dean McCormick would conclude it would result in *no tool at all.*

II

POLICY CONSIDERATIONS

BASI identified five principles of policy which support the admissibility of evaluative reports. These principles demonstrate the soundness of this construction of Rule 803(8)(C) and center on *reliability, time, necessity, value,* and the *harmonious spirit* of the Federal Rules of Evidence. (BASI Br. pp. 20-26) Rainey failed to adequately address even the first of these policies. It is simply argued that "fairness" dictates they be given an opportunity to cross-examine the author of the report. Fairness does, however, mandate that the jury be given the opportunity to see and evaluate an official impartial

investigation into this accident and accept or reject the trustworthy report which resulted therefrom. Such a report is not excluded simply because it embraces the ultimate issue to be decided by the trier of fact. Fed.R.Evid. 704

In its initial brief, BASI traced the development of this rule from the Advisory Committee's notes through Congressional action, court opinions and those of legal scholars, which result in the soundness of the policies established. There is a solid line of logic and wisdom which support the admissibility of evaluative reports. The arguments advanced by Rainey fail to address the soundness of these interpretations.

Finally, it is not the wealth of cases that control. It is the logic and wisdom contained in these opinions that serve as essential guidance. BASI respectfully urges the Court to approve the admission of the evaluative findings contained in the JAG Report and reverse the decision of the Eleventh Circuit Court of Appeals on this issue.

III

CROSS-EXAMINATION OF RAINEY

In justifying the admission of improper opinion evidence, plaintiffs rely on portions of Rainey's letter that were *never published to the jury by testimony or by document.* Specifically, that Rainey's wife violated pattern integrity and turned crosswind without proper interval. Both the original panel and the *en banc* panel of the Eleventh Circuit based their reversal on an incorrect understanding, as expressed in the panel opinion, that Beech questioned Rainey about the damaging admissions

contained in his letter to the JAG investigator. (infra. pp. 12-13)

IV

APPLICATION OF RULES 106 AND 801(d)(1)(B) FOR THE FIRST TIME IN THE ELEVENTH CIRCUIT OPINION—TOO LATE—AND INAPPLICABLE

Plaintiffs fail to directly address the points raised by BASI demonstrating that Fed.R.Evid. 106 was misapplied by the Eleventh Circuit Court of Appeals. Briefly stated, these points are:

> (1) Rule 106 must be positively invoked in a timely fashion or it is waived. This rule was never raised by Rainey at trial, never argued to the trial judge on the Motion for New Trial, and not briefed nor argued before the Eleventh Circuit Court of Appeals.
>
> (2) Rule 106 may not be used as a vehicle to admit otherwise inadmissible testimony. Rainey had not been and never was qualified as an expert to express an opinion on the probable cause of the accident, and the trial judge properly sustained the objection. (J.A. 77; infra. p. 11)
>
> (3) Rule 106 is only applicable where portions of a document sought to be admitted are necessary to explain other portions already admitted. Rainey's opinion on probable cause did not explain or qualify the portions of the letter relating to the pilots' preflight activities and the final flight maneuvers about which Rainey was questioned on direct examination.

Plaintiffs only argue, *without citation of legal authority,* that they were excused from making an offer of proof because the substance of the evidence was apparent from the

leading nature of the question. This falls far short of the requirements imposed by law.

In asserting objections to a trial court's exclusion of evidence, a party is required under Fed.R.Evid. 103(a)(2) to carefully articulate every ground for which the evidence is admissible. This Rule provides:

> Rule 103—RULINGS ON EVIDENCE
>
> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> * * *
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

See also Huff v. White Motor Corp., 609 F.2d 286, 290 n.2 (7th Cir. 1979); 4 J. Weinstein & M. Berger, *Weinstein's Evidence,* § 103[03], 103-31, 32 (1985). The rationale supporting this requirement was explained in *Reese v. Mercury Marine Div. of Brunswick Corp.,* 793 F.2d 1416, 1421 (5th Cir. 1986):

> Busy trial courts should not be required to repeat trials, especially civil trials, because the trial judge has excluded evidence for lack of a clear understanding of the proponent's purpose in offering the evidence. The trial judge must be put on notice of the purpose for which the evidence is offered while there is still time to remedy the situation. It is the proponent's duty, not that of the trial court, to articulate the purpose for which the evidence is offered.

On cross-examination of Rainey (called by Beech as an adverse witness) his counsel skipped from subject to

subject in an effort to rehabilitate his client in areas covered on direct examination. The inquiry was not a question but a statement of Rainey's unqualified opinion that the most probable cause of the accident was rollback. Rainey's counsel asked:

> Q. One last point. In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably primary cause of this mishap was rollback?
>
> Mr. Toothman: I would object to this, Your Honor. Probable cause is an opinion.
>
> The Court: I beg your pardon?
>
> Mr. Toothman: He's trying to get an opinion out of him now, not a fact.
>
> The Court: Objection sustained. (J.A. 77)

If Rainey's counsel believed the opinion was admissible under Rule 106 or to remedy an impression of inconsistency under Fed.R.Evid. 801(d)(1)(B), then he was required to articulate that reasoning to the trial judge. Perhaps counsel was satisfied to simply make that statement to the jury, despite the objection which was sustained. Such matters are rarely rejected or forgotten by a jury. It is improper to purposely present evidence of such a questionable nature to a jury without either giving opposing counsel a reasonable chance to object or present it for ruling by the judge outside the presence of the jury. (Fed.R. Evid. 103(c)) Had he done so he could have fairly and in a timely manner called Rules 106 and 801(d)(1)(B) to the attention of the trial judge. The judge could have then made a fair and informed ruling. Fed.R.Evid. 103(c) provides:

> Hearing of jury.—In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

Counsel failed to act properly and cannot now rely on these rules for a reversal of the jury's verdict. As the court explained in *Tate v. Robbins & Myers, Inc.*, 709 F.2d 10, 12 (1st Cir. 1986):

> A party may not claim an error on appeal in the exclusion of evidence unless the district court was told not only what the party intended to prove but also for what purpose. See, e.g., 4 Weinstein Evidence, § 103 [03], at 103-33 (1985 ed.) ("In making an offer of proof counsel must be careful to articulate every purpose for which the evidence is admissible; a purpose not identified at the trial level will not provide a basis for reversal on appeal."). Thus, if evidence is excluded because it is inadmissible for its only articulated purpose, the proponent of the evidence cannot challenge the ruling on appeal on the ground that the evidence could have been rightly admitted for another purpose." McCormick, *Evidence* § 51, at 112 (1972).

It is clear from the transcript that the trial judge believed the only purpose for which Rainey was questioned was to offer an unqualified expert opinion on the cause of the accident. No other purpose was articulated by Rainey's counsel, and the Eleventh Circuit *sua sponte* misapplied Rules 106 and 801(d)(1)(B) to find reversible error.

In the original panel opinion the Eleventh Circuit for the first time *sua sponte* raised Rules 106 and 801(d)(1)(B). In doing so it erroneously assumed that the following damaging statements in the letter were published to the jury. ["*In paragraph four, Rainey had written that the*

aircraft piloted by his wife violated pattern integrity . . . as it turned crosswind without proper interval." Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1528 (11th Cir. 1986)] (emphasis added). These statements were *not submitted to the jury in any form.* Obviously both the original panel and *en banc* panel erroneously assumed this was submitted to the jury and this erroneous impression motivated both panels to reverse on this point. This was such a departure from the acceptable and usual course of judicial proceedings so as to require a reversal by this Court. Sup.Ct.R. 17.1(a).

CONCLUSION

The decisions of the Eleventh Circuit Court of Appeals should be reversed and the cause remanded to the district court for reinstatement of the final judgments for defendants.

Respectfully submitted,

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